UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

- x

UNITED STATES OF AMERICA, :

Plaintiff, : Criminal Action No. 1:16-cr-10094-LTS

v. :

ROSS MCLELLAN, :

Defendant. :

- x

BEFORE THE HONORABLE LEO T. SOROKIN, DISTRICT JUDGE

JURY TRIAL
Day 14

Monday, June 25, 2018
8:44 a.m.

John J. Moakley United States Courthouse
Courtroom No. 13
One Courthouse Way
Boston, Massachusetts

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MISCELLANEOUS

P R O C E E D I N G S

(In open court.)

THE DEPUTY CLERK: The United States District Court for the District of Massachusetts is now in session, the Honorable Leo T. Sorokin presiding.

Today is June 25th, the case of United States vs. Ross McLellan, criminal action 16-10094 will now appear before this court.

THE COURT: I see all counsel and Mr. McLellan. Good morning.

So Mr. Weinberg, at least, was busy this weekend. So let me go over what I am changing in light of what he filed and what I'm not changing. I'll just mention what I'm going to change.

First, I've revised the verdict form to go back to one general question, the way I originally had it. It's just going to ask on Count 1 -- this is just with respect to Count 1. The question will just be conspiracy to commit offenses against the United States, guilty or not guilty. I'm not breaking it out further. I had broke it out one way, you didn't want that. That's fine. I understand why. But I'm concerned about the -- breaking out the way you suggest the risk of potentially inconsistent verdicts. And in any event, so I'm leaving it that way.

With respect to the instructions, then, I changed,

just to conform at the end of the conspiracy section, question 1, it just refers to one question now, instead of two questions. I -- on -- I've deleted the language, "In the absence of some other representation," about spreads markups. I've spent a lot of time thinking about that over the weekend and reading his submissions, and thought about the arguments you made, Mr. Frank. And in the end, I think it's correct the way it is and it makes the point that needs to be made, but doesn't go further into it. And so I'm making that change.

A minor typo at the beginning of the wire fraud, it had said, in the second line, "Title 18, United States Code provides wire fraud," and I think it should say "prohibits," because that's what it does.

And then in the second motion for reconsideration, with respect to aiding and abetting, I went back and looked at that, looked at the Supreme Court case law on that. I think that -- while I don't think -- I think Mr. Weinberg makes a reasonable point that the language I had is not as clear as it ought to be. So I actually made two changes to that, in light of what I read in the Supreme Court's decision.

Under the second element, where it says "intended to help the other person," I've added "commit the securities fraud or wire fraud."

And then at the end of the sentence is, after the language "seeking to make it succeed, by taking an affirmative act."

The other things changes that he requested I'm not making, so to those extents, the motions for reconsideration allowed and denied.

MR. FRANK: Your Honor, on the one point on the legal duty to disclose commissions, first of all, commissions is a term that their expert testified is -- is used in an agency relationship. And in an agency relationship, there is a duty to disclose. So the instruction we submit is incorrect in that respect.

Second of all, there's only two ways to trade fixed income, either as an agent or as a principal/riskless principal. If you're trading as a principal/riskless principal, this is a correct proposition of law. If you're trading it the other way, it is an incorrect proposition of law. And so by leaving out "in the absence of some other representation," there is always some other representation, because you can only trade it in one of two ways and this is only correct as to one of those ways.

THE COURT: Well, the general legal duty -- there's no general legal duty. The duty arises when you take on a specific role, or say something.

MR. FRANK: When you trade fixed income, you either

trade it one way or the other way.

THE COURT: Well, you could trade as a principal for yourself. You could trade as a principal or riskless principal for someone else, or you could trade as an agent for someone else, right?

MR. FRANK: Well --

THE COURT: We've heard evidence about companies trading for their own account.

MR. FRANK: I'm sorry?

THE COURT: We've heard evidence about companies trading for their own account, right?

MR. FRANK: But then there would be no issue of disclosure. So when -- I mean, stipulated that this only is relevant when trading on behalf of another individual or entity, but when trading on behalf of another individual or entity, there is a general legal duty to disclose when you are acting as an agent. There is only not a duty to disclose when you are acting in a principal or riskless principal capacity. So you're always going to be trading on someone's behalf in one of those two capacities.

THE COURT: What if I go to Goldman Sachs and I say I want to buy a billion dollars worth of treasury bills and they say, okay, we'll sell them to you.

MR. FRANK: Then, at least the confirmation will indicate whether they're trading in an principal or agency

capacity. It has to, under the statute.

THE COURT: Right.

MR. FRANK: Under the regulations, disclose that.

THE COURT: And if they say they're the principal, they don't have to disclose to me --

MR. FRANK: Correct.

THE COURT: -- whatever you want to call it, commission, markup or spread. We certainly have heard some testimony that all those things are the same.

MR. FRANK: Well, his testimony is that the term commission would never --

THE COURT: But I'm not bound by his testimony. I'm just talking about, would you admit that there has been -- you have elicited evidence that it's the same.

MR. FRANK: I have elicited that evidence, but if we are referring to the regulation, which I believe is what the Court is referring to here, Rule 10b-10. It only refers to spreads or markups and it only refers to them in the context of a principal --

THE COURT: I'm referring not to the specific regulation, but as to the general notion that there isn't some -- the reason that I add the word "general" is there's no -- as I understood the evidence, there's no overarching legal duty that applies in all circumstances. The duty arises when you say something or trade -- say make a

representation about what role you're in, or say something. And that the mere act of having an undisclosed revenue without more is not enough.

MR. FRANK: So the concern is, Your Honor -- I understand that. But the Court is defaulting to the principal relationship in the absence of a representation and there's no reason to default to the principal relationship in the absence of a representation, any more than there is to default to the agency relationship, in the absence of a representation.

If you go to Goldman Sachs, in the absence of a representation, it's simply unclear whether they're acting as an agent or principal, until you get that confirmation, where they are under a duty to disclose what capacity they're acting in. And if they disclosed that they're acting in a agency capacity, they have a duty to disclose commissions. And if they disclose that they're acting in a principal, they don't --

THE COURT: What's the problem, though?

MR. FRANK: I'm sorry?

THE COURT: What's the problem? You're going to argue to the jury that they said they were agents, they said they were fiduciaries and they lied to them, right? And then that's not contrary to any of this.

MR. FRANK: Because in the absence of -- in the

absence of the -- in the "absence" language, we believe that the instruction could be confused by the jury to suggest that no matter what they say, there is no legal duty to disclose.

THE COURT: What do you think about that, Mr. Weinberg?

MR. WEINBERG: I think it may be nice as a matter of generic philosophy, but the testimony here, Your Honor, including testimony from Mr. Menchel, is institutional investors only expect in-trade fixed income as riskless principal or principal. There's no evidence that the Government has introduced, through trade confirmations, for instance, that State Street traded fixed income as an agent. That would result in a different confirmation, so Your Honor's instruction given the --

THE COURT: Well, isn't there evidence that they said they were agents?

MR. WEINBERG: There's evidence they said they were agents in different context, which is going out to the marketplace as an agent for the client. There's no evidence through documents in this case that fixed income was traded as an agent and, therefore, this instruction is correct, based on the evidence in this case. And any other instruction just dilutes the purpose of the -- it leads to speculation.

The Government can argue that they made these

promises, but the reality is the trading was as a principal, as a riskless principal, the generated confirmations, the slips with the number 7, which indicates principal. There's -- Mr. Frank may be, again, right, as a matter of generic philosophy, but on the record of this case, we're dealing with fixed income traded as a principal. That's what Mr. Menchel said is the everyday norm of institutional investors, the expectations of asset managers and the reality of how bonds are traded.

MR. FRANK: Tom Clemmenson, in fact, testified specifically that fixed income was traded at State Street both as riskless principal and in some instances as agent. And in fact, testified that it was much more complicated when they did it as agent, because there was more manual labor involved in doing so. Kristen Morris corroborated that testimony, as well. And Mr. Menchel corroborated that testimony. Because although he testified that in his experience, it is usually done -- with institutional investors on a riskless principal basis, he said it could be done on an agency basis. So there was testimony from three witnesses on that front.

And again, I appreciate the recognition that I'm right as a matter of philosophy. I'm right as a matter of regulation and of law. That when you're trading under reg 10b-10 on an agency basis, you do have a duty to disclose.

And that's the only quibble that we have with the --

MR. WEINBERG: But, Judge, on the record of this case, the evidence, for instance AXA, where Ms. Morris and Mr. Clemmenson exclusively testified, you have a tape of Mr. --

THE COURT: I'm sorry, Mr. Weinberg. I just don't see how the jury is going to be confused by this in this case. In other words, in this case, you're arguing that they made misrepresentations and that they lied to them. And all of that follows after -- whatever the baseline is and all this is really seeking is what the baseline is before they've done anything.

MR. FRANK: I agree with Your Honor, but my concern is that by leaving out the phrase "in the absence of some other representation," the jury could be confused, because what Your Honor is -- what Your Honor understands and I understand to be the baseline, a jury could understand to mean there is no legal duty to disclose, regardless of what representation -- because it's stated full stop. There is no legal duty to disclose markups, markdowns, spreads, or commissions on fixed income trades. Period.

MR. WEINBERG: Judge, this goes right back to Mr. Clemmenson's testimony, which is that agency is going to the marketplace on a client's behalf and trading. It's not inconsistent with trading as riskless principal.

Secondly, the tape of AXA where Mr. Frank mentions Ms. Morris, Mr. Clemmenson, the tape says they're trading as principal, as riskless principal. There's no evidence of trading in this case as an agent. The Government can say the clients have misled, but this is an absolute correct statement of law in relation to the facts of this case. If the Government had proof that they traded this as an agent and didn't disclose it, we haven't. They had no proof. Every trade, every fixed income trade that's at issue in this case is as riskless principal and, therefore, the instruction is correct.

MR. FRANK: Your Honor, we think the safest course would be to not wade into this area of law. Mr. Weinberg can make his arguments about Mr. Menchel's testimony and the legal duty to disclose as he sees fit. But we respectfully submit that if you are going to wade into it, it needs to be hyper-technical.

THE COURT: Okay. I'm not giving hyper-technical jury instructions, because that's not going to be helpful to the jury, and I don't think that I need to be hyper-technical here.

I'm going to think about this for one moment.

(The Court and law clerk confer.)

THE COURT: I'll tell you what, the concern I have is not quite the direct point Mr. Frank has made, but the

point that he has made that there's the risk that it would mislead the jury in some way. That I'm concerned about. I don't -- the hyper-technical explanation, the details of 10b-5, or the rule, I don't think that this implicates or inaccurately states it. But I just want to think about the wording of that. So I just want to take a two-minute recess to think about that to get it right. And then I'll tell you what I think and if you don't like it, you'll tell me, and then we'll proceed.

MR. WEINBERG: Thank you. And while you're taking the recess, could I burden Your Honor to reconsider the page 34, which is to allow the jury to consider sharp dealing or unethical conduct in determining whether this scheme to defraud -- sharp dealing is the contrast to criminal dealing. It's what Mr. Boomgaardt said in his prior statements. We thought this was sharp dealing. I think it invites the jury to convict Mr. McLellan based on business conduct that they may find as sharp, it's not transparent, doesn't meet some moral right or wrong standards. Unethical -- most of what's -- some of what's unethical overlaps with criminal, much of it doesn't and given the --

THE COURT: But all I'm telling them is they may consider it.

MR. WEINBERG: But they may consider it as an invitation to convict based on largely decisions of sharp

dealing, which in an everyday real world is what a lot of people think is inherent in business. I think it invites the jury --

THE COURT: Do you think it creates that invitation?

MR. FRANK: I'm sorry, Your Honor?

THE COURT: Do you think it creates that invitation?

MR. FRANK: I would prefer there be no reference to any of this in the indictment, in the jury instruction, Your Honor. I think running a stop sign is one thing. Running a stop sign and killing somebody is another thing, and you can consider the running of the stop sign in considering what happened next. But I don't think that needs to be mentioned in the jury instruction.

Mr. Weinberg has asked the Court to put this in the jury instruction, but doesn't want the second proposition, which is that running a stop sign itself is not the issue, but it may be considered as to the ultimate issue. And we think -- I think, in fairness, if the first part is going to be in there, the second part should be in there, as well.

THE COURT: That's what I think. That's what I think. I'm going to leave it the way it is.

MR. WEINBERG: Well, then, I would say amongst the options, and without waiving my right to request the first

part, I think the second part has such risks of toxic spillover, having the jury convict on legal conduct, that I would ask the Court to take both sentences out. Again, that's not my primary request, but that's the request that I necessarily have to make.

THE COURT: All right. What page is that on?

MR. WEINBERG: Page 34.

THE COURT: So you would rather me say nothing, than -- hold on.

MR. WEINBERG: I think, again, Your Honor, should say what's in the sentence before the last, but I think the last sentence not only cancels out the sentence before it, I think it leads to the -- to a likelihood of deliberation that's not restricted to what is or is not a crime.

THE COURT: All right. I'll take both out.

You don't object to that, do you, Mr. Frank?

MR. FRANK: I do not, Your Honor, thank you.

MR. WEINBERG: Respectfully, I object to taking out one sentence, but Your Honor has heard my argument.

THE COURT: Okay. All right. Okay. I'll take a two-minute recess just to look at that one sentence.

THE DEPUTY CLERK: All rise, this matter is in recess.

(Court in recess at 9:05 a.m.

and reconvened at 9:17 a.m.)

THE DEPUTY CLERK: The McLellan matter is back in session.

THE COURT: Please be seated. All right. So I've looked that over and thought about it and I'm going to leave it the way I said this morning. I've read -- reread the instruction. There's various places that make clear that affirmative misstatements are illegal and that reckless indifference -- I'm sorry. That half-truths or concealment of material facts can constitute fraud. So I think the risk of confusion is minimal.

So I'm going to leave it that -- the only change that I'm going to make as a result of our discussion this morning, is I'm going to take out the two sentences, the breach of contract, and the following "however" sentence.

All right. So we'll bring the jury in. The Government will close first. I thought we'd take like a five-minute break, after the Government's closing, let the jury go to the bathroom, or what have you, then come back. Then we'll do the defendant's close, then the rebuttal, and then we'll take the longer break and then I'll give them the charge.

And you're going to -- do you want a warning at like five minutes to an hour, 55?

MR. JOHNSTON: I don't believe we'll need a warning.

THE COURT: All right. Fine.

Okay. Maria, go get the jury.

MR. WEINBERG: Judge, if I could have a warning at an hour, although I'm -- for my argument, I'll know I'm 10 or 15 minutes from sitting down.

THE COURT: Fine.

MR. WEINBERG: I guess not a warning, but a notice.

THE COURT: A notice. Yes.

(The jury enters the courtroom.)

THE COURT: Please be seated.

Good morning, ladies and gentlemen. Did you all have a nice weekend?

Yes. Good, nobody discussed the case among yourselves or with anyone else, no one did any independent research, read anything about the case?

Good. Now, as I told you, now we proceed to closing arguments, the final instructions on the law, and then you will commence to deliberate. Let me tell you the rough schedule for this morning. You'll hear closing argument from the Government, then we'll take a five-minute break, so you can go back to the jury room. We'll let defense counsel get organized. And so you can go to the men's room or the ladies' room if you wish. But just a very brief break.

We'll come back in and then we'll have the

defendant's closing argument, followed by the Government's rebuttal. The Government goes first and last, because they have the burden of proof in this case. Then we'll take -- it will be a little later than normal, but we'll take the longer morning break and then we'll return to the jury room -- the courtroom from the jury room and then I'll give you my closing -- my final instructions on the law and then you'll retire to the jury room and you can commence your deliberations. And as I said, we'll have lunch for you today, as well.

Okay. Mr. Johnston, are you ready?

MR. JOHNSTON: Yes, Your Honor.

THE COURT: Go ahead.

CLOSING ARGUMENTS BY THE PLAINTIFF

MR. JOHNSTON: Inadvertent commissions applied. Those are the defendant's words. Caught red-handed over charging Royal Mail, the defendant ordered his co-conspirators to lie. You know those commissions were not inadvertent. They were no mistake. They were no fat finger trading error. They were the same hidden commissions the defendant and Ed Pennings had been secretly planning to charge Royal Mail from the moment they bid on that transition.

Remember what the defendant said then? Thin to win. They were the same hidden commissions that the

defendant himself instructed Stephen Finocchi to apply to US bond trades and they were the same hidden commissions he later told Finocchi to zero out before sending over the file to his colleague, so that others at State Street wouldn't know about them.

People lie when they have something to hide, when they know they've done something wrong. That is why the defendant chose those words.

This was not the defendant's first lie, nor was it his last. It was just one lie, in a web of lies, that the defendant and his co-conspirators spun in a scheme to separate State Street's clients from their money.

At the beginning of this case, we told you the evidence would prove, beyond a reasonable doubt, that the defendant conspired with Ed Pennings and Rick Boomgaardt to add hidden commissions to billions of dollars worth of securities trade. They promised one price and then secretly charged another and that they did it at the direction of the defendant, Ross McLellan.

You know that the evidence has shown exactly that. The evidence has given you insight into the mind of this defendant, into what he was thinking when he and his co-conspirators spun that web of lies to take clients' money and into what he was thinking when they lied again to cover it up.

Through his words and his actions, you know that this defendant did exactly what he was charged of doing, cheating State Street's clients. It is the choices that he made and the actions that he and his co-conspirators took that bring us here today.

We're now going to take you through the evidence and through each of the counts of the indictment. For his actions, the defendant is charged with three crimes, wire fraud, securities fraud, and conspiracy to commit those crimes. Judge Sorokin is going to instruct you as to the elements of those charges, and what we need to prove.

The evidence I will summarize for you establishes each of those elements beyond a reasonable doubt. I'm going to organize the evidence in three buckets. The first bucket, evidence proving that there was a scheme to defraud, that lies, misleading statements, and half-truths were told.

Second, evidence proving that the defendant was involved in that scheme.

And third, evidence proving that the defendant knew what he was doing was wrong and that he had the intent to defraud.

To the first bucket. You know from the evidence that there was a scheme to defraud, to lie to State Street's clients, to take their money. It involves stocks and bonds and lots of financial jargon, but at its heart, it was one of

the oldest and most basic frauds out there, bait and switch, or in the defendant's words, thin to win.

The defendant and his co-conspirators promised one thing and delivered another. They promised low fees and to act in their clients' best interest, to put their clients' interest ahead of their own, and they did the opposite, adding secret commissions that the clients couldn't see. Sometimes it was a penny or two per trade that they thought the clients wouldn't notice. Other times they were more aggressive, taking the price all the way up to the high of the day. Whatever the mechanism, the goal was the same, secretly pick the pockets of State Street's clients in order to make money for the bank.

You have seen the promises they made. They promised KIA they would charge zero commissions on two separate bond transitions. That they would make money on the deal on the other side so that KIA would be charged nothing. They promised Dutch Doctors they would charge one basis point of yield. They promised Sainsbury's a flat fee of 350,000 pounds. You know what that means, no commissions, no per trade charges.

You know from Dean Johnson that that's what he understood it to mean and you know from Pennings and Boomgaardt, that that's exactly what they intended. It was the same for Eircom. State Street proposed a flat fee of

400,000 euros, which was later negotiated down to 350,000 euros, and they offered Eircom a choice, either a flat management fee, or a capped commission. You know what that means, one or the other, but not both.

They promised Royal Mail a flat fee of 1.75 basis points of the assets. If that wasn't clear enough, they made it explicit later in the same proposal, commissions, nothing.

After Royal Mail reduced the size of the deal, Ed Pennings reaffirmed that promise, a flat management fee, who did he forward this e-mail to? The defendant. You know they intended Royal Mail to believe there would be no additional charges. Pennings and Boomgaardt told you that. And you know from Ian McKnight that that's exactly what he understood.

He believed the bank, he trusted them, he had no reason not to. They made the same promise to NTMA, zero commissions on all trading activity, and a flat fee of 1.25 basis points. It could hardly be more explicit. Zero commission. You saw the e-mail where the defendant said he read this very proposal and thought the text looked good.

You also know that after they won just half the deal, they asked for more money, two basis points. But NTMA bargained them down to 1.65. It was still a flat fee. Just like Royal Mail, just like Sainsbury's, NTMA thought those words meant what they said, zero commissions. You heard that

from Eugene O'Callaghan, and you also heard from Pennings and Boomgaardt that those were lies and half-truths, because they always intended to charge more.

Bait and switch, thin to win.

But those low fees weren't the only promises the defendant and his co-conspirators made. They also promised that State Street would act as an agent and a fiduciary, that it would act in its clients' interests, and put the clients' interests ahead of their own. They said it over and over and over again. Remember all those proposals we looked at? Well, here's one of them.

It's what they told Royal Mail, "fiduciary agent." They said the same thing to NTMA. "Fiduciary agent." Take a look at these proposals in the jury room. They're Exhibit 70-1 and 91-1. That was their promise. That is how they earned their clients' trust.

Those promises meant that State Street would go into the market to find the best prices for its clients and that the only difference between that market price and the price the client paid was the agreed-upon commission, where they were charged a flat fee, instead of commission, that number was supposed to be zero. But you know the defendant and his co-conspirators didn't keep those promises and never intended to.

You heard from Boomgaardt and Pennings that those

promises were designed to make the clients believe that that was all they would be paying, to lure them in, and then secretly charge them something else, thin to win.

When they did charge more, the clients didn't know it, because of the way bond prices are reported to them, a net price, with the commission built in, so the client had to take it on faith that they had actually been charged the right amount. You know that's true, because you heard them talk about it in realtime.

(Audio plays.)

MR. Johnston: That's Exhibit 43. That's where Pennings tells Boomgaardt to lie to Dutch Doctors about how much they're being charged. Eventually, they figured out how to do the same thing for stocks, hiding those extra fees behind a net price, so the clients couldn't find out. You cannot tell a client you are charging one basis point and then secretly charge 1.5. You cannot tell a client that you are making money from the other side and then secretly charge them out of their own pocket. And you cannot tell a client you are charging a flat fee and zero commission and then secretly charge the very commission you promised not to take. When you do those things, when you mislead your clients through lies and half-truths in order to take their money, that's fraud.

You know that some clients were easier marks for

that fraud than others. KIA was one of those clients. They didn't understand certain financial concepts like other investment managers. They were sloppy with paperwork. As Pennings told the defendant, they were clueless.

(Audio plays.)

MR. JOHNSTON: You can hear Pennings and Boomgaardt make fun of Das, the relationship manager at KIA, because he didn't understand the concept of bond duration, like other investment managers did. Other clients were tougher to put something past. Ian McKnight wanted to make sure for the avoidance of doubt that their fee included all trading costs. He told you why he asked, not because he was confused, but because he wanted it in black and white, so that State Street couldn't wriggle out of their promise later.

At the end of the day, each of these clients trusted State Street to live up to its promises, that it would be their agent, their fiduciary, that it would act in their best interests, and that it would charge the prices that it promised. The defendant and his co-conspirators violated that trust and they did it on purpose. That's how you know there was a scheme to defraud.

I'm now moving to the second bucket, evidence proving the defendant actively participated in this fraudulent scheme alongside Pennings and Boomgaardt. As you know now, he directed it. You have heard from the defense

that the defendant never spoke to most of these clients, that he never met them, never talked to them, never sent them an e-mail or texted them. Well, of course he didn't. Because in this scheme, everyone had their own role to play and talking to clients wasn't the defendants'. That was Pennings' job. He was the front man. Boomgaardt crunched the numbers and dealt with the European traders. And the defendant was the boss, he approved it all. In Pennings' words, he made sure the traders in the US did what we want.

The defense also told you that there were a thousand transitions a year and that the defendant was flying around the world and was far too busy to pay attention to all of them. Well, that's precisely the point. Because here's what you know. He did pay attention to these deals, the elephant deals. They were the ones that drove the bottom line and he was personally involved in these ones every step of the way. You heard that from Boomgaardt and Pennings, you saw in e-mail after e-mail. You saw it -- you heard it in recorded call after recorded call. And Kristen Morris, Tom Clemmenson, and Stephen Finocchi all told you the same thing, how unusual it was for the defendant to personally direct traders what to charge, particularly after trading had already started. Except for these deals, it never happened.

The scheme started with KIA. Revenues in early 2010 were sagging and the defendant was pushing his

team to make more money. They knew that unless they bid zero, they would lose this deal, because other banks had different ways of making money that weren't available to State Street. So they cited to bid zero and charge a hidden commission anyways.

Pennings and Boomgaardt both told you that the defendant was in on this decision, that he approved it. And you know that's true, because you have other evidence to back them up, like this e-mail. It's Exhibit 8, where Pennings tells Das that whatever money State Street will make will come from the other side of the transaction. An explanation that Pennings told you was utter nonsense. Pennings forwarded that e-mail to the defendant, and you know why, because he wasn't going to go ahead on this scheme without the boss's okay. And whatever Das did or did not understand about whether State Street was going to make money, this much is clear. That statement was a lie. It was intended to deceive, and the defendant's name is on it in black and white.

You also know that the defendant personally told the traders how much commission to charge on each and every one of those bonds. That money wasn't coming from the other side of the trade, it was coming from KIA.

You also know that the defendant personally signed off on the proposal to NTMA. Here's that e-mail, Exhibit 69,

where he told Pennings he had read the submission and thought the text was good. That's the very same proposal where State Street promised a flat management fee and zero commission, the same proposal where they promised to be NTMA's agent, its fiduciary, to act in its best interests. When they won that deal, at a flat fee of 1.65 basis points, it was the defendant who agreed they would need to be very creative. And you know what that means: Charge hidden commissions. Pennings told you that.

On Christmas Day, the defendant and Pennings discussed exactly how much those hidden commissions should be. That's the flat fee at the top. Right below it are the hidden commissions. The defendant's response? "Merry Christmas, Saint Eddie."

Take a look at it yourself, it's Exhibit 81.

You then heard the defendant, himself, directing Joe Dionisio to charge those same hidden commissions.

(Audio plays.)

MR. JOHNSTON: Finish it off. $0.15 a share on over 4 million shares of the Russell 2000, traded on the New York Stock Exchange. More than $600,000 for State Street, money that belonged to NTMA, to the people of Ireland. It was the same with Royal Mail. Pennings forwarded the defendant the opportunity the moment it arrives and the defendant told them how to respond. "Thin to win."

You know what that means, lure them in with a low fee.

When they won the deal, Pennings again forwarded the e-mail to the defendant, laying out the terms, a flat fee of 1.75 basis points, or 227,500 pounds. Once again, they discussed the hidden commission.

"I am thinking 1.5 to 2 basis points yield."

It's Exhibit 92.

You know that's exactly what they ended up doing. The defendant instructed Finocchi to apply a basis point of yield in the US, and Boomgaardt instructed them to charge two basis points of yield in Europe. Bait and switch.

Mr. Weinberg told you in his opening statement that the defendant's biggest mistake was putting his trust in the wrong person, Ed Pennings. But you know from the evidence we've just reviewed and all the other evidence in the case, that that's just not true. This was a criminal partnership from the beginning and the defendant was involved, alongside Pennings and Boomgaardt, every step of the way.

Here's how you know to a certainty that this wasn't Pennings' scheme alone, because the defendant orchestrated the same fraudulent scheme right here at home with AXA, another elephant deal involving billions of dollars of bond trades. It happened right at the same time as the scheme was reaching its peak in Europe and neither Pennings nor

Boomgaardt had anything to do with it.

From the moment the opportunity came in, AXA was the deal the defendant controlled. Here he told his salesman, Kevin Walker, "let's chase this Tuesday morning."

State Street's proposal to AXA was sent the next week, on Thursday, February 24, 2011, promising a very low fee. That was three days after that e-mail we just saw, where they promised a flat fee commission to Royal Mail, but then discussed an additional hidden commission. That was one day before that call we just listened to, involving Joe Dionisio, and that was four days before the periodic notice for Sainsbury's was signed, falsely promising a flat fee of 350,000 pounds. You know exactly what was on the defendant's mind.

Just as with the European deals, State Street promised AXA it would be its agent and fiduciary. That it would act in AXA's best interest. And they made it clear that all commissions would be fully disclosed. And just as with the European deals, they promised a low commission rate, this one, a .1 basis points of yield, which equalled about $592,000. They said it again, all commissions would be fully disclosed and agreed upon prior to the transition assignment.

The defendant was copied on this e-mail from Kevin Walker, because this was his deal. But that promise was a lie. Shortly after winning the AXA deal at .1 basis points

of yield, the defendant told his traders to charge something higher on a conference call, on March 2, 2011. It's Exhibit 116.

(Audio plays.)

MR. JOHNSTON: The defendant was halfway around the world in Australia at that time, but even that didn't keep him from cheating on this elephant deal. You also heard Walker on the same phone call tell the traders to ignore the trading instructions they would receive from Kristen Morris.

(Audio plays.)

MR. JOHNSTON: That's the same thing McLellan told Finocchi three weeks later on the Royal Mail deal, ignore the instructions from Samina Vernon, the transition analyst, and do what I'm telling you instead.

On Monday, March 7th, just before trading started, Morris sent AXA an updated pre-trade with lower commission numbers, approximately 423,000, because the in kind transfers had increased, which meant that there would need to be fewer trades. Jim Kelly told you that he thought State Street was living up to its promise, that it was acting as its fiduciary, and trying to find ways to cut costs, but the opposite was true.

In the end, you heard that Kristen Morris -- you heard from Kristen Morris that State Street took $1.3 million from AXA, three times more than the amount disclosed in the

final pre-trade report. It was a bait and switch, plain and simple. And it happened on the defendant's orders, with no Boomgaardt or Penning around.

So now you know that there was a scheme to defraud and that the defendant was involved at every step. So now let's move to the third bucket of evidence, which proves that the defendant intended to mislead his clients and knew what he was doing was wrong.

How do you know that? First, it's just common sense. You can't lie to people to take their money. You learn that before you leave elementary school. You can't tell a client you will charge them one price and then actually charge them another. You can't promise someone you'll act as their agent and in their best interest and then secretly help themselves to their money. That's exactly what they were doing here.

Second, Pennings and Boomgaardt told you, from the witness stand, that they knew what they were doing was wrong, but you don't just have their testimony. You also have what they said to each other at the time. You know that -- you know that because around January of 2010, somebody anonymously faxed the defendant a spreadsheet, showing that a competitor, Bank of New York, ConvergEx, was charging its clients secret commissions higher than the ones that had been agreed upon.

Pennings told you about the spreadsheet and you heard that the defendant told Special Agent McGillicuddy about the same spreadsheet when he was interviewed in January 2012.

The defendant thought it came from an unhappy former ConvergEx employee, who wanted the industry to know what was going on.

You saw this e-mail from January of 2010, in which the defendant -- in which Pennings, with the defendant's blessing, tried to use that spreadsheet to disparage BNY ConvergEx with a prospective client. Look at the subject line. "Artificially low commissions due to undisclosed spreads." That's the same scheme, bait and switch.

Look at what they called that spreadsheet "BNY ConvergEx client abuse list." The words speak for themselves. The defendant and Pennings believed that what ConvergEx was doing was abuse, that it was wrong. And you know that's true, because you heard Pennings tell Boomgaardt the same thing.

This is what he said on April 19, 2010, eight years before testifying in this case. This is a conversation -- he tells Boomgaardt about a conversation he had with Alex Johnston, a ConvergEx salesman.

(Audio plays.)

MR. JOHNSTON: It's wrong. Those were Ed Pennings'

words eight years ago. It was wrong to tell the client you're their agent and then secretly take their money and it is wrong to rely on vague language in a contract as a cover for those lies. And he said that before he had ever applied a single hidden commission at State Street, before any Government investigation, before pleading guilty to any crime.

You know that the defendant shared those views. When Special Agent McGillicuddy interviewed the defendant as part of the ConvergEx investigation in January of 2012, the defendant said that State Street fully disclosed its own commissions and that it didn't take any spreads. He said that it was only okay to take a spread if it was disclosed to the client and the client was not a fiduciary. The defendant said those things to an FBI agent investigating ConvergEx. But you know that the defendant had taken hidden spreads on all of these deals and personally directed traders to apply those secret charges. So why wasn't he honest with the FBI? Because he knew what he had done was wrong and he wasn't going to admit it to an FBI agent investigating an almost identical scheme.

Here's another reason you know the defendant believed that he was doing something wrong. He and his co-conspirators hid their conduct from clients and even from others within State Street while they were doing it. If

you're doing nothing wrong, you have nothing to hide.

Take a look at Exhibit 67. This is the e-mail between Pennings and the defendant, where they're deciding how to pitch NTMA. Pennings says, "How about a one basis point management fee or something of that nature, no commission, and then take a spread?"

The defendant responds, "Agree with the zero commission bid. Ian will need to trade net."

You know that for bonds they always traded net, but for stocks, they never did. By this point, though, they figured out a way they could trade stocks net, using a special principal trading account that was never used for transition clients, the VWAP account. You know that the defendant instruction meant tell the client zero, but have Ian Holden trade those stocks in the principal accounts, so they could add a secret commission and hide it from the client.

And look at Pennings' response "Have to charge a management fee, otherwise they get suspicious."

Think about that sentence for a minute. Suspicious of what? Suspicious that they are living up to their end of the bargain? Suspicious that they are acting in their clients' best interests, suspicious that they are only charging what the clients expect? There is no innocent way to complete that independence.

Listen to Exhibit 32, the call between the defendant and his Boston traders on June 15, 2010. You heard from Boomgaardt that the defendant was in London at the time and he personally sat down on the trading desk to figure out how many pennies to add to each trade. They had the data from Bloomberg, but they wanted Finocchi to send over the data from another source, to see if Tradeweb prices were even higher.

(Audio plays.)

MR. JOHNSTON: You can hear the defendant laugh as he asks for the highs, and now you know why. You heard from Finocchi that, until then, he had never before sent over the highs before booking out a client trade. It never happened, because they always knew what they were charging before trading started and he had never before been told by the defendant, a senior executive, what to charge on a particular trade. Boomgaardt told you they did it, because they wanted to charge KIA as much as possible, while reducing the chance that the client would notice.

You also heard from Boomgaardt about what he was thinking that day when he drove home. Here is how he testified on cross-examination.

"It was in my mind that this was the wrong thing to do. I remember driving home from work and sitting and putting those spreads on the trades with Ross beside me,

going what we've done is not right here."

Listen to Exhibit 129, where the defendant instructed Finocchi to ignore the written trading instructions he had received from Samina Vernon, telling him to apply zero commissions on the Royal Mail transition.

(Audio plays.)

MR. JOHNSTON: Now listen to Exhibit 131, where he instructs Finocchi to delete that commission information before sending the trading file over to Vernon.

(Audio plays.)

MR. JOHNSTON: "Don't send her that line." Those are Ross McLellan's words. If you're doing nothing wrong, you have nothing to hide.

Yet another reason you know, to a certainty, that the defendant and his co-conspirators knew what they were doing was wrong, is that when Royal Mail came knocking, the defendant ordered the coverup. They didn't want Royal Mail or anyone else to find out what they had done. You heard from Ian McKnight that he learned through TRACE reporting that a basis point of yield had been applied to all US corporate bonds. That made no sense, because Royal Mail had been promised a flat fee and zero commission.

When Pennings asked what they should call the overcharges, the defendant's response was "inadvertent commissions applied."

He proposed they give back the million dollars they had earned on the US trades and explained it away as a fat finger trading error.

Think about that. If the defendant and his co-conspirators honestly believed that what they had done was okay, if they were acting in good faith, why lie about it? If they thought the contract allowed it, that legal and compliance had approved of what they had done, why not say so? The reason is that they knew the contract didn't allow what they had done, because there is no contract in the world that allows you to promise one thing and do another. There is no contract in the world that allows you to lie. That's common sense. And you don't need to be a securities lawyer to know that you can't lie to take people's money. Boomgaardt knew it, Pennings knew it, and the defendant knew it, as well.

So they lie, and the decision to lie was the defendant's. He was the boss. He had approved the scheme from the beginning and he was not about to come clean. But lies, as the saying goes, have short legs. And the defendant's fat fingers story had a fatal flaw, because they just hadn't taken one basis point in the US. They had taken two in Europe and there was no way to explain that.

One fat finger story, they might have gotten away with, but two fat fingers was ridiculous. Of course, the

defendant didn't want to give back that money, anyways. Royal Mail didn't know about it, because those bonds weren't reported on TRACE. So what did they do? They crossed their fat fingers and hoped Royal Mail would go away, but you know that's not what happened.

Inalytics, the company the defendant had proposed hiring to confirm that State Street had done a good job on the transition was too persistent. It demanded verification of the European trades. And when the defendant refused to produce that data, Graham Dixon of Inalytics requested a letter from State Street's compliance department vouching for the accuracy of the million dollar refund. You know what happened next.

The defendant had Pennings write that letter, for the head of compliance, Mark Hansen, to sign. They went through several drafts. All of them suggested that the commissions were charged by mistake. All of them suggested that the million dollar refund was accurate. And all of them suggested, in one way or another, that compliance had looked at all the trades. All were lies.

Who ordered those lies? Who signed off on them? Who did Hansen rely on to ensure he had correct information? The defendant. "Looks good to me."

Those are Ross McLellan's words.

He lied to his own head of compliance, so they

would provide additional cover to his scheme. You lie and hide like that only when you know you've done something wrong. The defendant then ordered Boomgaardt to send this letter, with Hansen's signature on it. But you know that sending that letter was one step too far for Rick Boomgaardt. This was the mother of all lies. A false and misleading letter from the head of compliance.

So Boomgaardt refused the defendant's order, he didn't send that letter. Instead, for the first time, he went outside his chain of command, to Marshall Bailey, a senior executive at State Street in London, and told them what was going on. Then, with the scheme unravelling, the three co-conspirators got on the phone. The date was Friday, August 26, 2011.

You've heard that phone call and you have it in evidence. It's Exhibit 196. Boomgaardt and Pennings have both testified about it and I encourage you to listen to it back in the jury room.

On this call, the three men brainstorm about how to get out of this sticky situation they're in. As Pennings put it, they needed to defend the indefensible. And the defendant said pretty much the same thing.

(Audio playing.)

MR. JOHNSTON: "We don't have a leg to stand on."

Those are Ross McLellan's words, not based on Ed

Pennings' e-mails with Ian McKnight, not based on any missile in the night, as Mr. Weinberg put it in opening, based on the RFP. The proposal State Street had submitted, where they had promised a flat management fee and no commissions, where they promised to be Royal Mail's agent and fiduciary, where they promised to put its interest ahead of their own. The same promises as the defendant knew they always made, and that they had made to each and every one of the clients they had defrauded.

But now they had a new problem. They told Graham Dixon and Royal Mail for months that the charges were a mistake and had only been applied in the US. They had told Mark Hansen and the compliance staff the same thing.

But now Boomgaardt had told Marshall Bailey that the hidden commissions were intentional and that they had been taken in the US and Europe. So now they needed two cover stories. One internal, to explain to State Street's legal and compliance department why they had taken those hidden commissions. And one external, to explain to Graham Dixon and Royal Mail how they had made another fat finger error. This one in Europe.

Here's what the defendant said.

(Audio plays.)

MR. JOHNSTON: Ladies and gentlemen, you don't message the truth, you tell the truth. Those were just lies.

It wasn't a booking issue, there was nothing to confirm. You know that those commissions had been applied on purpose. Internally, Pennings advocated two possible messages. First, claimed this was business as usual.

(Audio plays.)

MR. JOHNSTON: You know, that there was -- this was nothing like they did in foreign exchange. They didn't lie to clients about foreign exchange. They didn't negotiate with clients about foreign exchange, or bargain about exchange rates. Most importantly, foreign exchange was a different business unit. It traded the bank's own money as a counterparty to the transition desk. It was a used car lot that they shopped at on the client's behalf.

Second, Pennings proposed relying on their fallback cover story, the one they previously rejected when talking to Royal Mail, that the contract allowed them to do this.

At first, both the defendant and Booomgaardt rejected that idea. Here's what the defendant said.

(Audio plays.)

MR. JOHNSTON: But then, a minute later, the defendant decided the contract story was actually a pretty good idea.

(Audio plays.)

MR. JOHNSTON: Ladies and gentlemen, when you go back to the jury room, listen to the defendant's words. It

actually does say the manager may benefit from the commission. Those are not the words of someone who has relied on the contract in good faith. Those are the words of someone who thinks he's found a cover story. And you know that because the defendant said as much in almost the same breath.

(Audio plays.)

MR. JOHNSTON: "Where that does help us is internally."

Those are Ross McLellan's words. He's found an excuse. But even the defendant doesn't know how to explain away one basis point versus two basis points. He's stumped.

"You got to come clean, you come clean for everything."

Ladies and gentlemen, people who act in good faith don't need to come clean. People who have been telling the truth don't need to come clean. Only people who lie, people who know they have done something wrong need to come clean. And those are Ross McLellan's words, not anybody else's.

You know what happened next. The lies continued. For the first time, the defendant went to legal and compliance with the cover story they discussed on that August 26th phone call. Here's what he told his boss, David Puth that same day:

"We took a basis point of yield on these

transactions, which is our customary charge for bond transactions."

That's lie number one. You know that they took two basis points in Europe.

"The issue is that this was not disclosed to the client and they also paid us a management fee for the transaction."

That's lie number two. It wasn't not disclosed. They weren't just silent on what they were charging. They lied to the client. They told them there would be no commission. They intended to mislead.

Here's his exchange with Marshall Bailey. Bailey asks, "Can you point me to the people that have advised you on the FSA and UK Europe regulation and what steps have been taken to ensure your comfort that we are fine with respect to the contract in FSA?"

Further down he asks, "Who in legal and compliance have been consulted?"

The defendant's response? "We'll call you this morning."

You know why he gives this answer, because until then no one in legal and compliance had been consulted. In fact, the defendant had been lying to compliance all week.

Remember how concerned the defendant and Pennings were back in October and November of 2010, with the second

KIA deal? Legal was looking at whether they could use the new rates desk as one of the used car lots that they would shop at for the other side of the bond trades.

Here's what Pennings said to the defendant then.

"I don't want to look at the contract with legal at all."

Pennings told you what the issue was. They were worried that legal would spot what they were doing and put a stop to it.

The defendant then asked, "Did legal look at the original agreement?"

Pennings' response? "Absolutely not. Nor did they look at the periodic notice. This can of worms stays closed."

They were concerned that they would have to go back to KIA and tell them the truth and they didn't want to do that.

"There is no way we can disclose our spread."

The defendant's response? "Agreed."

But if legal found out that KIA had been told zero commissions on bonds, there was no way they would approve. Here's what the defendant said. "I would be surprised if they accept."

Pennings: "Accept what?"

The defendant: "Letting us do the trade."

Think about that. This was after they had already done the first KIA deal, after they had already cheated Dutch Doctors. Those are not the words of people who believed that legal approved or would ever approve of what they were doing and legal never did.

Here's what actually happened. Legal gave the go-ahead for using the rates desk. That's why they were looking at the deal in the first place. They didn't know what Pennings and the defendant had told KIA. They never saw the e-mails promising zero commissions, so they didn't spot the lie. The defendant and Pennings dodged a bullet here and they breathed a sigh of relief.

The same day that the defendant sent that e-mail to Marshall Bailey on August 26, 2011, he supposedly came clean to compliance. Here's his report to Boomgaardt about that conversation with Marc Hansen.

(Audio plays.)

MR. JOHNSTON: "We have never hidden the fact that we intentionally charged a markup here."

Think about that. This is the same defendant who had been lying to Hansen all week, who had ordered Rick Boomgaardt to send a letter signed by Hansen calling the markups an unfortunate error.

And here's what else the defendant said.

(Audio plays.)

MR. JOHNSTON: "We have been silent on what our compensation was."

You know that's not true. They were not silent. They explicitly promised Royal Mail that they would charge no commissions and that they would act as its agent and fiduciary, in the very same proposal that the defendant admitted gave them no leg to stand on. And in that same sentence, in which he told that lie, the defendant said this. "We have never tried to defraud the client."

Ladies and gentlemen, it is no accident that the first time the word "fraud" is used in this scheme, it comes out of the defendant's own mouth, because he knew that they hadn't been silent and that misleading clients to take their money is fraud.

Here's another way you know, to a certainty, that he believed what he was doing was wrong. Listen to what the defendant said about their future trades for the Royal Mail deal. You remember that State Street earns money for futures pursuant to a separate agreement with the client.

(Audio plays.)

MR. JOHNSTON: Think about that. "On the futures, we don't have anything to hide."

Because if you've done nothing wrong, you don't have anything to hide.

But on the bond trades, they do have something to

hide. They have $2 million in Europe to hide, because they've cheated Royal Mail and still haven't come clean. Those words tell you everything you need to know about the defendant's state of mind. So that's the third bucket of evidence, proving that the defendant knew what he was doing was wrong and had the intent to defraud.

I now want to address two final points before discussing the charges. First, you know that this fraud mattered. In legal terms, that it was material. You heard from five of those clients, managers of pension funds, Government funds, people who invest money on behalf of others, on behalf of retired supermarket cashiers, mail carriers, and the people of Ireland.

Four of them came here from Europe, an ocean away to tell you why they believed that they were cheated. They thought they were getting a good service at a low price from a bank they could trust. They haggled over the commission numbers. NTMA bargained them down from two basis points to 1.65. Instead, NTMA was secretly charged an extra 3.2 million euros. Royal Mail was secretly charged an extra $3 million, many times more than what it had agreed to pay. Dutch Doctors was charged over a million dollars in hidden charges. That money mattered.

Ian McKnight told you that it added up to $10 out of the pocket of every postal worker in England. Eugene

O'Callaghan told you that that money was part of a rescue package for a nation in crisis. Both of them told you that they would not have hired State Street if they had known what State Street actually intended to charge.

Dean Johnson told you the same thing, Roul Haerden said he would never have agreed to the price that Dutch Doctors had been charged.

Second, I want to talk to you about motive. The judge will instruct you as to elements of the crime. And to the extent what I say differs from what he says, what he says governs. But I don't expect you'll hear anything about motive. That's not an element the Government is required to prove. That said, you know the defendant did have a motive and a powerful one. Make money for his business unit and ultimately himself.

Here's what he said in March 2010, at the start of the scheme. "It has been a challenging start of the year for Portfolio Solutions, although there are strong signs that the year is turning and it is extremely important that we do so. We certainly do not want to forecast down further, as this will not bode well for us in areas such as compensation and promotions later in the year."

Here's what he told Pennings and Boomgaardt -- Pennings and Peter Weiner two months later.

"Our revenue lately has sucked."

You know what happened one month later? The first KIA deal, then Dutch Doctors, and then came the second KIA deal and all the rest. Millions of dollars in revenue, all of it -- many of it in hidden commissions that resulted in a strong performance for 2010 and a great start for 2011.

And you know what happened exactly one year after you saw that e-mail, where the defendant warned about the consequences of not meeting revenue targets? He became one of the youngest executive vice presidents at State Street bank, based in part on a record year in 2010, with strong year on year revenue growth. And you know that the defendant's personal compensation was tied directly to that revenue growth.

Now, let's talk about the charges.

I told you earlier that the defendant is charged with three different crimes. Count 1 charges conspiracy to commit securities fraud and wire fraud. As the judge will instruct you, a conspiracy is nothing more than an agreement between two or more people to do something that the law forbids. The agreement doesn't have to be explicit or written down, it can be a common understanding, an unspoken agreement. Here you know that there was an understanding between the defendant, Ed Pennings, and Rick Boomgaardt to cheat State Street's clients, and that there were many overt acts, such as e-mails and phone calls, that were taken in

furtherance of this conspiracy.

Counts 2 and 3 charge securities fraud in connection with the NTMA and Royal Mail transitions. Securities fraud just means fraud in connection with US stocks or bonds. Here Royal Mail and NTMA thought they were getting the market price for every stock and bond they bought or sold. In fact, you know that every one of those purchases and sales contained a hidden commission, and both involved US stocks and bonds that were bought and sold by State Street's traders right here in Boston.

Counts 4 and 5 charge wire fraud. That just means fraud involving the use of interstate or foreign wires, like an e-mail or phone call. The wire alleged in Count 4 is Exhibit 142. It's the e-mail between Pennings and McLellan, on April 5, 2011, where Pennings notified McLellan that they would take more of a spread on NTMA. The wire alleged in Count 5 is Exhibit 167, the June 22, 2011 e-mail, where the defendant tells Pennings to lie to Royal Mail by telling them that inadvertent commissions had been applied.

Count 6 charges wire fraud affecting a financial institution. This is in connection with the scheme to defraud AXA. The wire charged in Count 6 is Exhibit 101, the February 24, 2011 e-mail by Kevin Walker, sent from Boston to New York, with a copy to the defendant. It was in this proposal that they said they would do the fee -- do the

transition for 592,000.

For Count 6, there is an extra element. The judge will instruct you that the parties have agreed that the fifth element of Count 6, that the conduct affected a financial institution, has been met. Those are the charges before you.

During the course of this trial, you have probably learned more than you've ever wanted to know about stocks, bonds, commissions, markups, agents, and principals. You have seen hundreds of documents and e-mails, heard hours of testimony, and listened to dozens of recorded calls. But at the end of the day, the only thing you really need to decide this case is what you walked into court with three weeks ago and that's your common sense.

Common sense tells you that misleading clients by promising to charge them one low fee and put their interest ahead of yours and then secretly turning around and charging them something more is fraud. Common sense tells you that no law and no contract allows you to lie. And common sense tells you that only someone who knew what he was doing was wrong, lies and covers it up like the defendant did -- you don't need to be a securities lawyer to know any of that.

All of the evidence in this case, the tapes, documents, testimony, and the defendant's own words lead to a single, inescapable conclusion, that this defendant is guilty beyond a reasonable doubt as charged.

THE COURT: Thank you, Counsel. Ladies and gentlemen of the jury, I remind you that statements of the lawyer in closing argument are helpful to you, if you find them helpful, but it's not evidence.

We'll take just a five-minute break and then we'll resume with closing arguments from the defendant.

All rise for the jury.

(The jury exits the courtroom.)

THE COURT: Do you want the monitor, Mr. Weinberg?

MR. WEINBERG: Yes, Your Honor.

THE COURT: Okay.

(Court in recess at 10:18 a.m.

and reconvened at 10:22 a.m.)

THE DEPUTY CLERK: The McLellan matter is back in session.

MR. FRANK: Your Honor, I was just reviewing the defense exhibits.

THE COURT: You can be seated.

MR. FRANK: Could I just have two minutes?

THE COURT: Yes.

(Pause.)

(The jury enters the courtroom.)

THE COURT: Please be seated.

Mr. Weinberg.

MR. WEINBERG: Thank you very much, Your Honor.

THE COURT: Go ahead.

CLOSING ARGUMENTS BY THE DEFENSE

MR. WEINBERG: Good morning, ladies and gentlemen and thank you for your service as we start the Monday of the fourth week of this trial.

Outside of wartime, probably the highest service that a citizen can give this community, this democracy, is to serve on a jury. This has not been a simple case, this is not like TV justice, where you get simple solutions in 60 minutes. I don't think any of you are of my age and remember a TV show, Perry Mason, where at the 60th minute of every show somebody confessed and the case was taken away from the jury with absolute certainty. We instead rely on jurors to determine which witnesses to believe, which witnesses not to believe. The Government gets its chance to argue. I get my chance to respond.

The Government argument told you part of the evidence. They told you, for instance, that Mr. McLellan, on June 15, 2010, asked to see the highs and lows of the day's trading for KIA. The Government didn't tell you that Mr. McLellan, thereafter, working from London, where he was there for other purposes, added a markup to the high of the day, a markup that would be detectable, visible, known to the KIA. If he in any way thought that he and State Street were not permitted to take a markup, that KIA believed that there

would be no markup taken, he could have easily marked up the bond to the high, but not exceeding the high.

The Government tells you he called for the highs and lows. They didn't tell you that having received the highs and lows, he made the markup deliberately -- and deliberately available to Das, the representative at the KIA.

The Government stressed that Mr. McLellan said to Mr. Finocchi, you know, charge a basis point and don't tell Samina Vernon. The Government failed to advise you of Exhibit 535, which is an exhibit where the people in State Street believed that Samina Vernon was leaving, that she was going to switch jobs, that she was going to go to the competitor Russell.

The Government focused that Mr. Pennings didn't want the lawyers at State Street to see the contracts with KIA. They didn't tell you that Mr. McLellan sent the contracts to Bryan Woodard, who was the global chief lawyer of State Street Global Markets. The Government stressed pieces and snippets of audios. They didn't play the part of the AXA audio where Mr. McLellan, calling in to five traders on a tape-recorded line, said we need to be fair and reasonable in our fees that are being charged to AXA. The language that the day before he had received and learned about in an e-mail on March 1 from Chris Carlin, that quoted two lawyers saying that in this case, AXA, the fees need to

be fair and reasonable and will be certified to the AXA advisor. This is in an e-mail between Mr. Carlin to Mr. McLellan, but it talks about a conversation that involved two lawyers, Lance Dial, a lawyer at SSGA, which is the advisor to AXA and a lawyer, Melissa, who is Melissa McCay, a lawyer at the broker-dealer.

So again, you need to really be detectives here. You're going to have the exhibits in the jury room, you're going to have the audio of this call that Mr. McLellan made on March 2. It's a very important audio. I ask you to listen to it. It takes ten minutes.

Mr. McLellan is not engaged in a covert conspiracy with five different people that are on this call. Mr. McLellan is doing his job. He is advising them what the markup should be. There isn't a single word on that call about .1 basis point yield, which was something that was in a pre-trade. Instead, Mr. McLellan is being open, he's talking to the traders, he's asking them whether they have any comments or questions and he is saying to them, I need the markups to be fair, reasonable. We're going to certify them to State Street Global Advisors.

Let me step back a second. This is a criminal trial and a criminal justice system that protects citizens by putting the burden squarely on the prosecution table. It's the highest burden in the legal system and the best legal

system in the world. It means that if there is uncertainty, if you feel maybe McLellan did it, probably did it, possibly he did it, that is not a sufficient and principaled basis under the instructions that will be authoritatively provided to you by his honor, Judge Sorokin, in a short period of time.

It's got to proof beyond a reasonable doubt, meaning unimpeachable proof. Proof from principal witnesses. Proof from witnesses you trust. Repeatedly, Mr. Johnston said, as he tries to build a bridge between the evidence and Mr. McLellan, he tells you, "How do you know?"

Well, because Pennings and Boomgaardt told you that. You heard it from Pennings and Boomgaardt.

Pennings and Boomgaardt are their foundational witnesses. They are their only bridges between the pre-trades, the responses to proposals, the conversations with the European clients and their representatives and Mr. McLellan. They are the pillars of the prosecution. They are corrupted witnesses. They are witnesses that didn't come to court and raise their hand and testify without the hope, without the expectation of benefits, rewards, the most compelling benefit and reward, which is that they want from the Government a ticket to freedom. They are expecting in exchange for their testimony to go home.

You know that, because Mr. Boomgaardt has a plea

agreement, as does Mr. Pennings, that has the Government giving them a benefit, which is that if they are sentenced to any term of imprisonment, the Government will not oppose a transfer of that back to Great Britain, back to where they live, back to where their children are, and Mr. Boomgaardt says I don't even know about that, which is a fair indication that Mr. Boomgaardt is believing that exchange for his testimony, he's going home. He doesn't have to worry about where he's going to be incarcerated as a result of his plea of guilty. He expects to go home. So does Mr. Pennings.

So this is this pivotal moment where, in an hour, an hour and a half, the case goes to you. You've been silent judges of the facts. The Court will give you the legal instructions and you will then begin to deliberate within the structure that Judge Sorokin gives to you. But believability, unbelievability, assessing, evaluating witnesses, deciding whether or not, in a matter as gravely important as a criminal prosecution of a citizen that said to you I'm innocent, who's exercised his right to trial, who has entrusted his future to you, whether or not you believe Pennings and Boomgaardt, and I submit they are the indispensable sources of evidence. If you don't trust them, there is simply a gaping hole between the Government proof and Mr. McLellan. If you don't trust Pennings and Boomgaardt, then the Government case falls.

So let me focus first on them, with this prelude. Mr. McLellan, as you know, as I believe the Government just conceded, spoke to none of the European clients, never spoke, never e-mailed, never texted Mr. McKnight at Royal Mail, Mr. Johnson at Sainsbury's, any of the European witnesses who are clients of Mr. Pennings. There is no dispute that Mr. McLellan didn't write these RFPs, the requests for proposals. He didn't write the pre-trades. He didn't communicate by document or by word with any of the clients that make up Counts 1 through 5 -- and we'll discuss AXA separately in a while.

Accordingly, he relied on Mr. Pennings. They were his clients. Yes, as Mr. Johnston said, Mr. McLellan had a thousand transitions a year on his plate and his responsibilities spanned that the bank, beyond transition management, to all kinds of other types of bank business. He was on the executive committee of the State Street Global Markets. He had a lot on his plate. The Government focuses on six or seven of a thousand transitions as if that constituted the entirety of Mr. McLellan's work life. He had to rely on people.

He didn't know Irish law, British law, was not licensed by the British regulators. You may remember there was a part of a pre-trade that had a slot on the bottom for all the different countries that State Street traded in,

South Africa to Japan, Australia to Great Britain, all over the European union. Mr. McLellan couldn't master the laws, the practices, the regulations. He needed to trust the people that State Street selected to man the desks in London, in charge of the Mideast and Europe and Asia. He trusted Mr. McLellan -- I'm sorry, Mr. McLellan trusted Mr. Pennings.

The evidence is clear that Pennings alone went out and talked to the clients, met with the clients, made promises to the clients, negotiated contracts with the clients, talked to lawyers in London about the contracts, got assurances from the lawyers in London that these contracts in the business relationships and the way that the clients were being priced was consistent with what the lawyers in London approved. And we'll focus in a few minutes on a very pivotal meeting with five lawyers and Mr. Pennings made certain statements that are critical to our understanding of the fabric of these negotiations.

But again, the first pathway to a decision, I suggest, for your consideration, is whether or not you trust and believe Ed Pennings and Rick Boomgaardt. What you do know about them is that both admitted, on cross-examination, that they lied over and over and over and over again on matters of their own self-interest. They lied to disciplinary officers at State Street. They lied to the City of London Police when they were conducting an investigation.

Mr. Pennings lied in a 98-page, written statement that he tried to pawn off to his lawyers, but ultimately admitted that he read -- he adopted, it came from his words. It was submitted to an employment tribunal, a judge-like proceeding in the Courts of the UK. He was under oath when he testified consistent with that 98-page statement, and he had no problems lying to the judge and the employment tribunal in London.

Mr. Pennings was asked about lying and he said I lied to keep my job. I'm not proud of it, he said, I made up things, didn't tell the truth. Mr. Boomgaardt wrote a 21-page, written statement, it started by focusing the persons receiving the statement -- which we're going to decide whether or not he did or did not maintain his job -- that my core principals, Boomgaardt said, are honesty and integrity. He wrote that at the very same moment and the very same statement that he has told you was filled with lies. Lies out of self-preservation, lies to preserve his job.

Pennings went farther. Pennings lied about other people. Pennings lied about the CEO, the head of the London desk, Mr. Steve Smit.

Pennings lied about a compliance officer named Mark Leaden. Pennings lied about lawyers and compliance people.

This is an example that shows Steve Smit, up there

as the head. Smit promoted Pennings to become a director of the State Street Global Markets and this is Pennings' disclosure to the State Street Global Markets executive committee that the fees that the European clients were being charged, the revenues that were being charged, were both fees and spreads and the spreads somehow, the markups were not being shown in the finances.

But I want to go back to what Mr. Pennings told you, which is that he lied about lawyers. He lied about Mr. Smit, he lied about Compliance Officer Leaden. He told you that he didn't think at all about what his lies would mean to them and their jobs and their careers as compliance officers and lawyers if Pennings' lies and statements to the employment tribunal and then to the City of London Police were believed. It didn't matter to him.

When I asked him about making false accusations against other people, his answer was "because it helped me at the time."

That's a reflection of who Mr. Pennings is. Didn't give a second of concern that his lies, if believed, would have cost Mr. Leaden, the compliance officer, his job. Would have cost Mr. Smit, who had a very good job at the bank, his job. Would have challenged the lawyers and the different professionals their futures, their reputations.

When I asked him specifically about Mr. Smit, his

words were, he fired me. He cost me money. I was angry with him. I was liberal with the truth. That's Mr. Pennings responding on cross-examination about how he felt, what was going through his mind at a time when he pointed a finger of false accusation at Mr. Smit during the investigation with the City of London Police.

I even asked Mr. Pennings, "Did you ever say to anyone that you even lie about lying?"

He said he didn't recall.

Each of these two cornerstone witnesses have something even more compelling on the line today than they had back when they were talking to employment tribunals and State Street disciplinary hearing officers, back when they were fighting for their job, their freedom on the line. They believe that if they provide value in the prosecution of Mr. McLellan, that they will motivate and incentivize Mr. Frank and Mr. Johnston, as representatives of the Government, to file a motion, a 5K motion, seeking sentencing leniency.

They executed plea agreements with the Government. Plea agreements would put -- which put all of the power, all of the discretion at their table. They could choose to file a motion for sentencing leniency and ask a judge for sentences as low as probation, or they could withhold that motion, and the Government recommendation under the guidelines would be five years.

Did Mr. Pennings and Mr. Boomgaardt five years or 85 percent of five years, in a foreign jail, in the United States, an ocean away from their family and kids, is the ultimate horror. And if they were willing to lie to preserve a job, what would they be willing to do today, on this witness stand, where the test of whether they've provided substantial assistance, not only rests solely in the discretion of the Government, not subject to appeal or review but the determination will be made, based on the truthfulness, their perception of the truthfulness. They have no lie detector test, it's what they view as being truthful.

And importantly, the value of the defendant's assistance, regardless of outcome in this case. They chose the agreements. They chose to predicate their decision whether to file this pivotally important motion, not just on their perceptions of truth, but on their perceptions of value. We're dealing with two self-interested, smart people in Pennings and Boomgaardt. They know what the word "value" means. They know its value to the prosecution in this case.

They know something else. Mr. Boomgaardt told you he's been sitting with the Government for 45 or 50 hours, and the Government has not yet decided whether he has provided substantial assistance. Mr. Pennings, too, has been regularly available to the Government to be debriefed,

neither of them would -- Mr. Boomgaardt told you that he would not, upon receiving a request for me, sit with me for one and a half hours, where he sat with the Government for 45 or 50.

I got no plea agreement with Mr. Boomgaardt. I can't reward him or benefit him or help him avoid a prison sentence.

But after all their cooperation, the Government still has not chosen whether to file that motion to recommend sentencing leniency or withhold it and recommend a 60-month term of imprisonment. And you can ask yourself why not and you can ask yourself whether that provides coercive powers over witnesses who, in their life, have demonstrated a willingness and history of committing perjury in other matters for their own self-interest.

Whether this deal and the way its written, and the language chosen by the Government, and bottom line is an invitation to perjurers, admitted perjurers, Mr. Pennings, admitted liars, Mr. Boomgaardt, to come into court and give you untrustworthy testimony, perjurious testimony, to make the same kind of false accusation against Ross McLellan, that Pennings made against Steve Smit, Mark Leaden, Simone Paul, other lawyers when he was debriefed and interviewed by the City of London Police and by the employment tribunal.

Mr. Frank and Mr. Johnston elicited, but you know,

we don't want to be prosecuted for perjury, they say. But they know that the people who decide whether to prosecute people are the prosecutors.

I ask you, please, in the jury room, to think hard about whether these are the kind of witnesses that you want to rely on in making a profoundly important judgment about Mr. McLellan.

I want to -- before leaving, the Court will instruct you shortly and he -- as to these witnesses, I think will say the following, that you must consider the testimony of Pennings and Boomgaardt with particular care and caution. They may have had reason to make up stories or exaggerate what others did, because they want to help themselves. I believe that will be one of the instructions given to you by the Court to help guide your assessment and evaluation of the credibility of the Government's cornerstone witnesses.

I want to focus next on February 21, an e-mail, written by Mr. Pennings to Ian McKnight. It was in the nighttime. There's really two different e-mails. And if we could blow up the bottom one.

They had a phone call and Mr. Pennings is saying to the representative of Royal Mail, "We can do this project for a management fee of 1.75 basis points of the value of the transition."

This is Pennings by e-mail telling Mr. McKnight

what the transition management fee will be.

But Mr. McKnight, upon receiving this e-mail -- and if the Government theory is correct, that a statement to a client about a transition management fee necessarily means that the bank can't also charge broker-dealer spreads, markups. It's one of the cutting issues in this case -- Government says when a bank says what the transition management fee is, that's the end of it. They can't charge anything else.

The contracts and the evidence presented by the defendant's experts say no. There's a fee for the transition managers and there's a markup or commissions for the broker-dealers and there's nothing about promising a transition management fee that prohibits the bank, if it's consistent with contract, to also charge a broker-dealer markup.

But here is a piece of evidence that can help resolve between these two views of the business world back in 2010 and 20111. McKnight, representing Royal Mail, responds. He doesn't just accept that the transition management fee is the only fee that State Street intends to charge Royal Mail. He says, "for the avoidance of doubt" -- key words, "doubt," he has doubt. "Can you confirm that this is your full and final transition fee" -- and this is important -- "including all the buying and selling required

by my trades?"

In other words, McKnight is saying in this e-mail, this is real contemporaneous business negotiations. I have a doubt about whether the transition management fee alone also encompasses, includes the broker-dealer markups. So McKnight is asking Pennings, on February 21, before Royal Mail finally agrees to do the transition, does that transition management fee also include the buying and selling required by my trades. Meaning, what the broker-dealer would also charge under normal circumstances for going out in the marketplace, and trading 1.3 billion dollars worth of Royal Mail bonds, selling them, buying new bonds for the new portfolio. That's what a transition is. They sell one group of assets, they buy another. $2.6 billion of trades.

McKnight knows, under ordinary circumstances, the broker-dealers are not doing that for free. You know that, too, because three broker-dealers testified. Mr. Clemmenson, Mr. Dionisio, Mr. Finocchi. All of them said broker-dealers get paid. We don't go to the market and try to select the best price and try to diminish the negative effects of market impact. We have skills. One of them went to University of Chicago, got a master's. Another one had two degrees. We have skills. We get paid for the skills; the broker-dealers expect to be paid. It's different than the transition manager. Both.

Of our experts, Mr. Travaglini told you it is regular for broker-dealers to be paid and asset managers understand that. Mr. Menchel, whatever we think of his demeanor, whatever we think of the fees he charged, we brought him to you because he was the chief counsel of FINRA, and FINRA regulates all of the broker-dealers. And he told you broker-dealers expect to get paid and there's nothing about transition management fees that means that broker-dealers don't expect to get paid, and the clients, investment clients, professional clients like Mr. McKnight don't expect to pay a broker-dealer.

So here's what Mr. Pennings answers, either about six minutes later or if the times are off, maybe it's longer than that. "The fee includes all trading required."

Now, here's what's important about this. Pennings, who regularly does an FYI and forwards e-mails to Ross McLellan, he stuck this exchange into his archive and he never ever sent to Ross McLellan anything except the trading management fee. He never told Ross McLellan he had guaranteed Ian McKnight, at 9:22 p.m., on February 21, that there would be no other fee, except the transition management fee. That he, Pennings, had made an off the contract, outside the contract, one-to-one promise to a representative of the pension investment fund that there would be no broker-dealer fees in this case. Not in other cases, in this

case.

We all know that the Royal Mail contract expressly allows for broker-dealers, affiliate broker-dealers, to charge markups. We all know that it allows the State Street not to put the markups on record. There's a specific clause in the contact between Royal Mail and State Street, no duty to disclose. But here, Pennings is making a promise, taking this outside the contract. He's saying there will be no trading fees. He doesn't tell that to Ross McLellan. He admits under oath he never told McLellan.

The Government does not dispute that there was no evidence that Mr. McLellan was told by Mr. Pennings that he had this e-mail exchange. And you can hear all those tapes from August 26, that Mr. Johnston took little snippets of. Hear them all. There's not a single word about Pennings having made a promise, one to one, to McKnight on that night before the deal occurred.

So why? It's fair to ask, if they're in a conspiracy together, that's the Government allegation. That's the pivotal allegation in this case that Mr. McLellan is responsible for Mr. Pennings' statements to clients and his, you know, charging certain fees and certain ways and responsible for this.

How can you be responsible for what you're not told about, but more important, ask why would Pennings hide this

e-mail from Ross McLellan, if they're in a conspiracy? And I suggest the answer is, they're not in a conspiracy, and he didn't want Mr. McLellan to see this, because if Mr. McLellan saw this, he would not have permitted the Royal Mail markups.

Mr. McLellan believes the contract approves the markups. This e-mail goes around the contract. Pennings, the representatives making the promise, I don't care about the contract. I'm not charging you trading revenues. Why would you hide that if you're in a conspiracy? You'd be telling your co-conspirator, this is what I promised to McKnight, he's going to believe there will be no markups, now we're free to charge markups. And yet Pennings denies Ross McLellan the knowledge of what he did in this nighttime e-mail.

What else it represents is the real world between banks and clients. It's got a real world client representative in McKnight. He's not satisfied to simply be told what the transition management fee is. Remember, he's read these RFPs, he's read all of the documents that the Government is providing. And he still has doubt. And he's saying for avoidance of doubt, please tell me whether or not that transition management fee includes the trading and it does.

The evidence is compelling in this case that Mr. McLellan trusted Mr. Pennings. He trusted Pennings to do

negotiations with clients, he trusted Pennings to do negotiations consistent with contracts, to do negotiations consistent with legal advice, not to betray him by hiding crucially important promises that Mr. McLellan didn't know about, not only in February, he didn't know about it in August. Pennings hid these promises throughout. And it is a betrayal. It's what I said to you in the opening, that a business manager doing a thousand transitions has to trust his people and he trusted Pennings and he trusted the wrong man. And through this e-mail, the wrong man put him in harm's way.

Had this e-mail been disclosed, Mr. McLellan wouldn't be in this courtroom. He would not have allowed that transition to occur with markups that were inconsistent with the e-mail, but fully consistent with the contract, which is all Mr. McLellan had in front of him to determine whether or not the markups were or were not in accord with contract.

Good faith. The Court will instruct you that because this is a criminal case, you must not only look to an act that is done, but look to why it's done, and whether or not a defendant, Mr. McLellan, had good faith. It's really because of the burden of proof is on the Government on this element, as well. It's whether the Government has proven to you, beyond a reasonable doubt, he didn't have good faith.

Or that they've negated good faith by such compelling witnesses and trustworthy witnesses, that you feel comfortable making the judgment.

You know, we have no CAT scans, we have no MRIs, we have no x-rays. We can't get into people's heads particularly as to what they were thinking and doing eight years ago. Transactions, transitions, occurring largely in London, with Mid East and European clients. But we have certain pieces of evidence that I suggest can help you resolve what Mr. McLellan was thinking about in Boston, largely while Mr. Pennings was negotiating these deals.

And one of the most irrefutable pieces of evidence is Mr. Pennings' telling you -- and it's one of the few places I'll endorse what he told you about a meeting that he had in April of 2011. This was a meeting that was attended by over four lawyers, he said. We can identify four of them, John Norris, who at that point was the chief legal counsel for State Street in its UK offices. Simone Paul, who had been the lawyer in the State Street UK offices that was charged with reviewing contracts.

And you have an e-mail, by the way, it's a short parenthesis, from a man named Bryan Woodard. Bryan Woodard was the global chief of legal. He and Mr. Pennings were e-mailing back and forth in January of 2011. Mr. Woodard is telling Mr. Pennings every contract gets reviewed by legal,

meaning UK contracts get reviewed by UK legal.

Back to this meeting. We have Norris and we have Simone Paul from State Street. We have Pennings from State Street and we have outside counsel, at least two or three of them, one is named Sarah Lewis, and there's several other lawyers from a law firm named Herbert Smith. A law firm in London, a law firm of solicitors, a law firm that is tasked with helping State Street create a model for their future transition contracts for clients where there's no preexisting contract, like there was for Royal Mail.

They're reviewing it, according to Pennings, clause by clause. They're reviewing the prior contract and trying to decide which clauses to keep, which clauses to delete, which clauses to revise.

The first thing they do is they focus on a clause that is in the model contract, that requires disclosure in the periodic notices. And this is a page of the contract that came after this meeting. It's in May of 2011, the meeting is in April.

I don't know whether we can blow that up, but I can read it. What's crossed out is the "amount of such commission and compensation permitted to be received by such associates, which is the broker-dealer, in any such transaction, shall be specifically identified in the transition notice."

Sorry. What's important is that that clause is deleted as a result of Mr. Pennings telling the lawyers he wanted the contract to conform to the business practices, the business model, and how he, Pennings, is charging the European clients. What did the lawyers do? They cross out the obligation in the contract to provide disclosure of the commissions and the compensation in the transition notice, which is the notice that accompanies a contract between State Street and the clients that are hiring State Street to do the transition management.

What else occurs? Mr. Pennings fights to preserve the clauses that you've seen in the Royal Mail contract, the clauses that allow the broker-dealer to charge a markup and markdown.

Royal Mail contract will be before you in the jury room. It's Exhibit 2, article 6, specific clauses that allow the broker-dealer, the associate, which means that they're a broker-dealer that works for State Street and does some of the transitions for the transition manager; that they're allowed to mark up bond trades, allowed to mark up with markups or markdowns. That stays in. Pennings fought to keep it in.

What also stays in is the clause of the contract saying there's no duty on the broker-dealer to disclose the markups to the clients. Pennings fought to keep that in,

with all these lawyers. It was kept in. They had a clause saying State Street won't charge a transition management fee. That came out. Pennings said that's not the way that I'm charging some clients. I'm charging them a fee and I'm charging them broker-dealer spreads.

And Pennings testified as to what he told this assembly of lawyers who had the job of creating, of architecting a transition management agreement to govern the transitions between State Street and its European clients, quote, "the market was less and less transparent. We may need those clauses."

Meaning the clauses allowing the markup without a duty to disclose. "We may need to rely on some of those clauses in the future. In fact, we had done so for a handful of trades already."

Pennings is telling you that he told the lawyers that State Street has done trades where they were markups by the broker-dealer that were not disclosed to the clients and that he needed those clauses to stay in the contract.

What happens? Not one lawyer tells him there's anything wrong with it. Not one lawyer says -- sounds an alarm and says, "Well, you've got to make a disclosure." Not one lawyer quarrels with him. Lawyers from inside State Street UK, lawyer from this outside firm whose job it is to make sure that the contracts align themselves with UK law, UK

regulations, not a single voice opposing the continuation of contracts that allow the broker-dealer to mark up bond trades, allow the broker-dealer not to put on record the amount of the markups and allow the combination of management fees and markups.

If this was a conspiracy of secrecy -- and I suggest the hallmark of conspiracies are secrecy -- Mr. Pennings is disclosing everything he did, and the lawyers are endorsing what he did. And Mr. McLellan is hearing that the lawyers endorsed what Pennings' new business model is. Your business is not always black and white. Businesses don't always have duties to spell everything out.

Some of you might have bought cars. You go to car dealers, we don't really know what their bottom line price is. They tell you a sticker price, you buy it, you feel good. They have no obligation to say we're getting a $4,000 rebate from the car manufacturer, our real price is $20,000, not the 24 that's on the sticker.

You go to a store, you really don't know what their cost of goods are. Businesses don't tell everybody everything. But when lawyers bless a contract, that is the opposite of a covert, secret conspiracy, the kind of conspiracy that the Government is trying to criminalize. There are such things as business disagreements. There are such thing as clients like Mr. O'Callaghan, that didn't say

to you, I didn't know there was going to be a spread, whether or not the contracts did or did not approve it. There are business disagreements.

These are billion-dollar businesses, a global bank, clients with representatives and consultants and sophistication. When there are disagreements, they get resolved.

You heard about a couple of clients blacklisted State Street, because they didn't like not knowing about the broker-dealer trades. You've all heard about arbitration, mediation, civil settlements. That's how businesses deal with monetary issues, without the heavy hammer of representatives from Washington's Department of Justice. Without the heavy hammer of a criminal prosecution.

Mr. Pennings told you not in his wildest dreams was what he was doing subjected to criminal charges, whether in Britain or here. Mr. Boomgaardt, too. Nobody was thinking this was a criminal issue. They weren't even thinking it was a regulatory issue.

If it was such a clear-cut issue, on August 26th, when Mr. McLellan was taking control and trying to get the contract, get the periodic notice, talk to Mr. Hansen, the head of compliance, talk to Mr. Woodard, the head lawyer. There was not a one-day decision. State Street didn't say, whoa, you had no right to charge Royal Mail a markup. There

was a business decision being made on these tapes on August 26th. You don't hear people saying, I'm worried about the Government.

What you hear them trying to do is to determine what's the best way to deal with a business problem, a client is seeking money back. He didn't know about the markups. Of course he didn't know about them. He was the client that got that secret e-mail from Pennings on February 21. These are business issues, not criminal law issues. And if this was a criminal conspiracy, you would not have Mr. Pennings telling four or five lawyers that owed him no duty, that owed a duty as lawyers to the law, you would not have him making that disclosure, and not having a single lawyer come back and say, Mr. Pennings, you can't do that. That's not appropriate. That's not what our contracts are meant to say and do to clients.

So let me focus on some of the transitions that Mr. Johnston focused you on.

KIA, huge, wealthy Mid Eastern sovereign wealth fund. What do we know? Well, we know that KIA says to Mr. Pennings, charge zero. If you don't charge zero, you're not going to get a piece of this transition. So Mr. Pennings charges zero.

What does a client think? That the bank is going to do a $4 billion transition for free? Of course this

client knew that there was going to be markups on trades. Mr. Pennings said it would be ridiculous for the client to think that the money was coming from somebody else who is buying or selling the bonds to KIA, or selling the bonds they're buying. It has to come from the spread. Das knew it, Das approved it. Das, whatever they want to say about his not being the most sophisticated person, anybody knows banks don't do $4 billion transitions for zero fees, zero commissions.

State Street's simply conforming its business proposal to what the client wants. That can't be a crime. That's business. If a higher proposal is going to get a rejection, you try to rework your pricing, charge them the way they want and charge the fees that Das, the representative of KIA, okayed.

How do we know he okayed it? Well, Mr. Boomgaardt is on tape, Exhibit 30, telling the traders on June 13th, they told us to take a markup or a markdown to remunerate ourself. They told us. The "they" is KIA.

How do they know that Ross McLellan knew that they knew? Again, look at Exhibits 33 and 35. 33 is Ross asking to see the day's high and lows. 35's are the prices the clients in fact, were charged, the prices the client was charged was outside the high/low range, sending an inexorable message to the client that we are taking a markup and we know

that you approve of it, because you've asked us not to charge you an explicit transition management fee.

On the transition 115, the June transition ends, what happens next? KIA is happy with 115. They award all of a bigger transaction in November to State Street. NTMA, Mr. O'Callaghan said that State Street, like with KIA, had lost a whole bunch of transitions. What does State Street do? They bring down their explicit fee to 1.25. 1.25, according to Boomgaardt, is just about enough to keep the lights on. Banks don't do this with something like a 7 or $8 billion of bond trading and equity trading. They don't take that on without making a profit.

Maybe Mr. O'Callaghan, for some reason, thought they were going to do it for 1.25. And I accepted there are disagreements and people in good faith can have disagreements and that's what contracts are for. And what do we know about NTMA? On December 24, 2010, in a tape-recorded call between Boomgaardt and Pennings, Pennings is saying to Boomgaardt, "just check it" -- which is the contract -- "and make sure it is reflective and doesn't say anything about not taking any spreads, because we are going to have to in the US."

And the contracts did not prohibit a spread. They did not prohibit the bank -- the broker-dealers from charging a markup. Mr. McLellan asked to see the NTMA contract. He reviewed it. He made sure the contract did not prohibit the

spread that those Christmastime e-mails said to Mr. McLellan we're going to be taking.

ETF? State Street, what they called disaggregated, that instead of making a one-time sale, Russell 2000, all of it sold in a single sale on the market, they broke it up, took the different stocks, sold them, made a huge profit for NTMA. $2.6 million of profit to NTMA to go against the ordinary costs of transitions from one set of assets to another. Yes, State Street made commissions on ETF trades.

KIA -- and they made 15 basis points. Mr. Menchel told you that the FINRA rules are -- they change -- had a seal under 500 basis points and that 25 basis points was well within the norm. So Mr. McLellan's charging 15 basis points is not out of the norm and there was no one that came into this court and said that they were excessive markups. The issue is whether they knew of the markups and I suggest that they didn't know of the markups, but the contracts permitted the markups. That's what a disagreement between companies is all about. That's not a crime. Twice, the evidence will be, Mr. McLellan called to review the NTMA contract and the contract had no prohibition on the taking of spreads.

KIA 121. This was different because David Puth wanted State Street, for the first time, to sell its own bonds to KIA, a group called Rates. So a lot of lawyers came into this, because this was an aberration of the State Street

model, which was to offer clients, being their agent, their conflict-free agent in the marketplace.

What does that mean? It means that they -- instead of selling the client their own bonds, they go out to the marketplace and they weigh different, competing brokers. This is the KIA post trade, which says our agency traded model proved effective over the course of the transition. We were able to find the best counterpart for each trade, meaning the best person to sell bonds KIA wanted, the best person to buy bonds KIA wanted to sell.

We executed with 17 different counterparties. That's what broker-dealers do. And that's what all this language about agency and the fiduciary and the RFPs means. It means I'm not going to go to one counterparty myself. I'm going to go to the marketplace as your agent and buy bonds at the best price, giving you the best execution. The best interest of the client doesn't mean that it's going to be done for free. Broker-dealers don't go to 17 counterparties for free.

So what happened here in KIA 121, when State Street, for the first time, wanted to sell KIA its own bonds. In other words, be its principal, not be a conflict-free agency broker. It brought the lawyers in. First the US lawyers -- Pennings did say I don't want them to see the contracts -- but the evidence before you, and if you look at

the e-mails from November 2 and November 3, Ross McLellan is sending the contract to Bryan Woodard. He is telling the lawyers here's what you need to decide.

Ross is saying I don't think they're going to approve it, not because there's anything wrong with the broker-dealer, us, doing KIA transitions. I don't think they're going to approve it, because it's different than our business model. It's got Mr. Puth, my boss, trying to involve another affiliate to buy and sell bonds. Well, the UK lawyers did approve it.

Everybody looked at these contracts, that's their job. The US lawyers looked at the contracts, the UK lawyers looked at the contracts. And in Exhibit 53 in front of you, where Mr. Bryant, who's a US trader, is sending this e-mail to Ross McLellan, it's November 2, in reference to the KIA fixed income trade, and it's very important.

"Melissa" -- that's Melissa McCay, US lawyer for State Street Global Markets -- "said earlier that she didn't see it as an issue that we both make money on this trade."

FIRB is rates, TM is transition management.

"So if we are forced to do so" -- they didn't want to trade with these rates.

"If we are forced to do so, we both should be able to charge, us as the broker-dealer, and them as the market maker on behalf of State Street."

That's a US lawyer who knows that the transition manager's broker-dealer is going to make a markup, make money. This, again, is KIA. It's another zero commission deal. This one Pennings promised them, we're going to do the custody cost as well.

In other words, without broker-dealer markups, State Street would be paying KIA to do a $4 billion transaction. Das, KIA, know there's going to be markups. Ms. McCay, the US lawyer, is reviewing the contracts and saying go ahead, there's nothing wrong with the transition management broker-dealer to be making money. The only way broker-dealers make money is spreads, is markups. There's nothing in the KIA contract that prohibits it. We know that, because Ms. McCay would not be approving the markup if there was something to prohibit it.

And we know the next day, the UK lawyers, despite Ross' prediction they won't okay it, did okay it. And we know that the KIA transition occurred and we know that KIA was happy with the results. And we know David Puth was happy with the results, Mr. McLellan's boss, because he went to London the next day, congratulated everybody and Pennings sends an e-mail, you know, "Puth loves Eddy."

The bank okayed the KIA transition, from the senior management to the US lawyers to the UK lawyers to the people on the ground, the traders. And his e-mail showing the

extent to which the traders knew there was going to be markups. It's Exhibit 59, an e-mail from an Adnan Choudhary, to about ten different people, telling them what the markup is on one of the two KIA trades. The only reason that Samina Vernon was walled off was because they believed she was going to Russell, which was the principal competitor of State Street in the market. And businesses keep their own confidences, they don't disclose them in the marketplace when it's unnecessary. But the people that needed to know, the traders knew there were markups. It was no secret and the lawyers approved it.

Royal Mail, when you look at the contract, Exhibit 2, it expressly okays the markups. It expressly okays not disclosing the markups and Mr. McLellan -- here's a piece of the contract.

"No duty to account for profits, neither the transition manager or the associate, the broker-dealer should be liable to account for the markups that are payable by the customer to the broker-dealer."

This is what Mr. McLellan was guided by by calling in and saying you can have a one basis point markup on the Royal Mail transition. He again did not know of what I did call in the opening the missile in the night, the betrayal of Pennings. Pennings having made a secret promise to Ian McKnight.

Briefly, because my time is getting short, is the Government has focused in their opening -- in their closing, their opening and closing on inadvertence, on this e-mail that was sent to Royal Mail. This e-mail was not an e-mail sent to Royal Mail to try to extract money from Royal Mail, to try to get them in a contract. This was an e-mail sent to a client by State Street, by Pennings, with Ross' knowledge, sending Royal Mail back a million dollars. It's one of the Government's charges of a crime, is an e-mail sent with a soft message to a client. It was inadvertent, here's the money you're asking for back.

There was other markups, those on August 26th, you'll hear the tapes. Mr. McLellan, when he took over this project on August 26th, read the contract for the first time in detail, and you hear his opinions change on tape. We don't have a leg to stand on, maybe the contract supports it. And then he reads article 6, the article you just saw, and says the contract does disclose the markup, does support no duty to disclose. These tapes are not tapes of a crime. They're tapes of a business trying to make a decision.

Remember, Royal Mail said we can be a good client. We have a $30 billion transition coming up. So what do businesses do when a client complains as Royal Mail did, and says to Pennings, hey, what were your fees; and Pennings lies to them, lied to them without talking to Ross.

Only after he says our fees are 1.75, 227,000, plus futures, then he says to Ross, Royal Mail is asking about the markups, we charge the markups. Ross says give it back to them. They're asking about the US markups. So he says it was inadvertent.

Businesses have choices. Ross had a choice, maybe he didn't make, in hindsight -- certainly sitting here, he didn't make the right decision. But it's not a criminal decision. Businesses don't always pick a fight with a good client. They could have chosen to say the contract allowed the markup, we're not giving you a dime back, and then what would have happened? Two things.

They would never have been considered for the $30 billion transition that was coming up. They would have lost a good relationship to a potentially good client. And Mr. Pennings would have been at risk of losing his job because he had lied to the client, without Ross' okay the night before.

You hear it on some of the tapes, Ross saying to Boomgaardt, I'm going to try to protect your job. That's what managers do. They try to be loyal to people. Again, at the time of this, Ross didn't know that Pennings had made McKnight that February promise. So they took the diplomatic way out. And Pennings told you, State Street regularly gives money back when clients complain. You don't pick a fight.

Every business doesn't have to assert a contract and refuse a client. Some businesses say the client is always right, and they look to the next buy, the next deal, the next transition to make the money back. That's the State Street model, the client is always right and Pennings says our practice at State Street was to quickly rebate monies when clients complaint. That's this inadvertent.

Instead of saying we intentionally charged you money and you may not be happy and we're not giving it back, they sent an e-mail saying the commissions were inadvertent, here's the million dollars back. It's not a crime.

Businesses don't always say everything to a client about their pricing or their customer service. Businesses can think the client is wrong, give them the money back. It's a business decision, not a criminal law decision.

This compliance letter --

THE COURT: Mr. Weinberg, just wanted to let you know where you are.

MR. WEINBERG: Thank you, Judge. I'll be winding down.

A compliance letter resulted from this series of e-mails. Mr. McLellan at the bottom e-mail is saying, "Aren't they asking Hansen to approve the total compensation, meaning the US and European bonds?"

Pennings says, "No, just what we gave back, I

thought."

"Rick?" He asks Boomgaardt.

Boomgaardt: "That is my understanding." Meaning Pennings'.

"By compensation amount, he means the check that we already sent, the $1 million."

And Ross says, "That should be easy."

And that's the context of the letters that are being discussed between August 22 and August 26, seven years ago. And when Ross is looking at a letter to compliance that talks about US bonds and TRACE and nonTRACE, this is the context, he believes, that the letter that's going to Mr. Dixon, who is the auditor recommended by Ross to Royal Mail. You don't do that if you think you did something wrong.

The letter to Dixon, by compliance, is thought by Ross McLellan to be a memorialization of the amount of the rebate that has already been given. The check that's been written. It's not some master conspiracy where a draft of a compliance letter is somehow inaccurate, as if this is the sum total of everything Ross McLellan is focused on, on August 22, 23, 24.

By the 26th, he's focused, and asking Boomgaardt, send me the documents, send me the contract, send me the RFP. He's asking Pennings questions, assure me this is legal in

the UK. Pennings says it's legal, unless we double-dip. Double-dipping is an arcane term. It means what ConvergEx did, two broker-dealer markups.

The Government brings in this witness, witness who went to Ross' house in 2012 to ask about a business dealings by State Street that were largely 14 years earlier, by ConvergEx, another company that was being investigated. And Ross makes statements about State Street doesn't have the ConvergEx model. We're open, which they are in the United States.

ConvergEx has two broker-dealer charges. That's double-dipping. That's what Pennings says you can't do on the August 26th tape.

These August 26th tapes of Ross and Boomgaardt and Pennings. I, like the Government, asks you to listen to them. They demonstrate a businessman, Ross McLellan, trying to deal with a business problem, which is do we just give Royal Mail back the remaining markup, or do we, at this point, assert a contract? If it was such a simple decision, there would be no decision. There'd be a return of the money that day, because lawyers and Mark Hansen have been brought into it and Ross has brought them in and Ross has escalated the issue in the business, and Ross is saying let's make an intelligent decision.

And if Ross McLellan thought he had something to

hide, he'd be saying to everyone, give them the money back, let's stop the complaints. These complaints can lead in the wrong direction. That's what Pennings is saying. Pennings knows the promise he made. Ross is saying let's have legal, let's have compliance look at it.

AXA. The charge is February 24th. There's a transition -- there's a pre-trade that goes to AXA. It's got one commission. There's no evidence -- you heard three witnesses talk about AXA, Kristen Morris, State Street, Kelly, AXA, Clemmenson, State Street. Nobody said that Ross McLellan's decided on the commission, read the pre-trade -- this is a criminal allegation.

There's a specific wire, the sending of a pre-trade by Kevin Walker to AXA with a cc to Ross. There's not a piece of evidence that demonstrates to you that Ross McLellan authored that pre-trade, ordered it sent, reviewed it in detail. It's over 45 pages.

What you do have, instead, on AXA is on March 1, Mr. Carlin sends an e-mail to Ross and others, Lance Deal, SSGA, "Legal has raised with Melissa McCay that we have a 17e issue. We will have to sign a certificate representing to AXA that our commissions are reasonable and fair."

Not a word about the two lawyers, McCay and Lance Deal, saying that we have to certify a one-tenth or one-percent commission, which is in the pre-trade, is fair

and reasonable. And if you listen to the audio the next day, Ross uses those words. We have to make sure our commissions are fair and reasonable. This is a client of our advisor, our other part of State Street.

There's no concealment here. You have e-mails showing that the revenues were greater than the revenues predicted by this pre-trade, no one asked Ross McLellan, what did you earn? Ross never lied to anybody. He didn't lie to AXA. Kelly couldn't even remember any conversations with Ross, except the one -- there was an e-mail the day before February 24th, they're exchanging nondisclosure agreements.

Ross is in Asia, he gets on the phone with the traders. Listen to the audio. It has nothing to do with a conspiracy. Ross is saying to them -- the Government didn't play that part -- make sure the fees are fair and reasonable. They need to get sent over to SSGA and we know the fees were fair and reasonable, because even with the fee that was charged, which led to 1.296. That's what JP Morgan wanted from AXA, 4.38 million. The fees were one-third of what this esteemed global bank would have charged the client for.

Again, the world of business is gray. I don't doubt AXA thought they were paying one fee and State Street another. Those are disputes that get resolved outside a federal criminal courtroom, where they're using speculation and guesswork to try to make Ross McLellan responsible,

criminally responsible for a pre-trade that was sent by Kevin Walker to AXA on February 24th, without a witness saying Ross read it, directed it, knew its content, or felt bound by the content. It's a pre-trade. The one thing you know about AXA, there was no contract.

The AXA witness says it's eight years -- seven years later. We're still looking for the contract. We don't believe that we did a transition for $10 billion without a contract.

Ms. Morris said, in my whole career at State Street, we never did a deal without contracts before. Contracts are what the parties negotiate. Contracts have a notice, the notice says what the commissions are. Parties don't rely on pre- trades. And parties don't rely on RFPs. The Government didn't say at the back of every RFP is a disclaimer saying this is not a contract. These are not promises.

Quickly, best interests of a client doesn't mean free trading. "Agency" means exactly what State Street did when they went out in the marketplace and they had 17 different counterparties. Sometimes in business, people disagree. That's why there are contracts. Contracts are relevant.

Why is Ross reviewing the NTMA contract? Why are outside lawyers paid to negotiate contracts? Why did

Mr. McKnight amend the Royal Mail contract? Because contracts define the rights of parties. And here the contracts supported the markups. Every lawyer that reviewed the business practice endorsed the business practice, because the contracts did not prohibit both a fee for the transition manager and a markup for the broker-dealer.

I'm getting close to the finish. But liberty is important and I want to make sure I've answered some of Mr. Johnston's arguments. He said that there was a motive on Ross McLellan's part to make money, to perform.

2010, Ross, for his performance, was promoted. He was promoted before the Royal Mail trades. He was promoted by his years of service to State Street. And when you're working for a bank, you don't break its rules. You know enough not to break its rules. The wider your responsibilities, the less any one transition means to your performance. Ross had global responsibilities for a thousand transitions. He's not affected by whether NTMA or AXA or any one transition made more money than another.

AXA made, I think, 7 or $800,000 more than AXA expected. You don't risk your career, your family, your reputation, your freedom on any single transition. These banks make billions of dollars. Your performance is spread over all of the transitions and more, because Ross was head of different departments, spread over all kinds of other

responsibilities. Yes, maybe Mr. Pennings in Europe, his performance was more geared as Mr. Boomgaardt's was to these specific transitions, but the wider your responsibilities, the wider is the criteria where a bank judges your performance.

Ross McLellan was not in trouble with the bank. Ross McLellan was their youngest executive vice president, promoted by the bank, on a great pathway to success. There was nothing in the evidence of this case that demonstrates that he would willfully, with a specific intent to disobey the law, that is the test that Judge Sorokin will give you, bad faith, not good faith, would risk all that for what? To have six different transitions make a little more money? A lot of money by our standards. Not a lot of money to a bank that had hundreds of billions of dollars.

Pennings, what did he get? Ross is his immediate supervisor, Pennings' bonus went down in early 2011. He's not getting rewarded by Ross McLellan for having done something in some secret conspiracy. His bonus went down, his salary went up. His bonus went down. There's nothing that indicates that Ross McLellan believes that Pennings was doing anything wrong.

This is the most important moment in a man's life. Your decision, and I ask you to make the decision not on sympathy, but on evidence. On the lack of evidence

connecting Ross McLellan to this blizzard of paper that was largely authored and sent and communicated by Mr. Pennings. I go back to where we started, the bridge between the proof and Ross McLellan rests on your acceptance or your rejection of the credibility, the trustworthiness, the fidelity to their oaths of the Government's two cornerstone witnesses.

I ask you to weigh their believability and I ask you, in good conscience, based on the evidence, to do one of the greatest things that one citizen can do for another, which is to come back to this courtroom with a verdict that will finally lift the shadow of this staggeringly difficult accusation to a businessman with a reputation and a job and a family, and lift this accusation and tell Mr. McLellan, at last, he is free.

Thank you very much.

THE COURT: All right, ladies and gentlemen. Thank you, Counsel. I remind you that while the arguments of counsel may be helpful, they're not evidence.

Mr. Frank will now give the Government's rebuttal.

REBUTTAL ARGUMENTS BY THE PLAINTIFF

MR. FRANK: Almost there, ladies and gentlemen. Good morning. There's a lot that Mr. Weinberg just said. I have a few minutes to respond and so I'm going to be very brief and target four points. First, he spoke to you about good faith. He spoke to you about meetings that happened

between Mr. Pennings -- not Mr. McLellan, but between Mr. Pennings and legal and compliance. In particular, that April 2011 meeting.

He didn't mention, by the way, that that meeting happened after most of these transitions had already occurred, after Royal Mail, after the two KIA transitions, after the Dutch Doctors transitions, after most of the NTMA transitions. That's when that meeting occurred, in April of 2011.

And he also mentioned legal looking at the KIA 121 transition, not for the purpose of approving hidden commissions, which they were never told about, but for the purpose of deciding whether the transition desk could trade opposite the rates desk, could use that used car lot as one of the car lots that they shopped at for those bonds that KIA wanted to buy. That's the reason that legal was looking at KIA 121. But those were the two moments when lawyers were involved that Mr. Weinberg wants you to focus on as evidence of his client's good faith.

So let's focus on those for just a moment. If Mr. McLellan believed that legal and compliance had signed off on what they were doing with these hidden commissions, then why was this such a secret within the bank? Mr. Weinberg just told you that the hallmark of conspiracy is secrecy. We agree. It's true. Why did he keep this such a secret within

the bank?

Why did he personally tell Stephen Finocchi to zero out those commissions when sending over the file to Samina Vernon. Mr. Weinberg wants you to believe it's because they were concerned that Samina Vernon was going to go to a competitor, Russell? What was she going to say when she got to Russell? Was she going to say, guys, you're never going to believe this. State Street is adhering to its contracts. Was she going to say, guys, you're never going to believe this, but over at State Street, Ross McLellan is charging clients in a way that legal and compliance says is completely authorized?

Is that what she was going to say? Or was she going to do at Russell, the same thing that that unhappy ConvergEx employee did, with respect to the spreadsheet he anonymously faxed Mr. McLellan. And say guess what's going on over at State Street? They are duping clients, they are cheating clients, they are taking money from clients that the clients don't know anything about, while promising them a low, disclosed commission. That's why he lied to Samina Vernon and told Stephen Finocchi to lie.

Why was all of this on a need to know basis? Take a look at Exhibit 98. That's an e-mail between Chris Carlin, his number two, his chief operating officer, and Paul McGee, the trader over in Europe. When Chris Carlin wants to know

why is NTMA being charged a flat fee and spreads, that's not our usual practice. And Chris Carlin says -- and Paul McGee says it's on a need to know basis, speak with Ross, he knows the strategy here. That's Exhibit 98.

Why, if this was something legal and compliance approved and that they thought legal and compliance had approved, do Ed Pennings and Ross McLellan, in November of 2010, talk about not wanting to show the contract to legal, about opening this can of worms. Why don't they say, by the way, there's no way we can disclose our spread and the defendant says agreed, if they thought legal and compliance would approve or had approved.

If legal and compliance had approved, why, in June of 2011, when Royal Mail asked about that basis point of yield that were charged on its trades in the United States, does the defendant lie. Mr. Weinberg has an elegant way of referring to a lie. He calls it a soft message. That's what he told you it was.

It wasn't a soft message. Inadvertent commissions applied is a flat out unadulterated unambiguous lie. They weren't inadvertent. You heard him on the phone telling Stephen Finocchi to apply those commissions, in defiance of the written trading instructions he received from Samina Vernon. It was a lie.

If all he wanted to do was service the client, give

the money back, because that's what they do at State Street, why not just give the money back, and say you know what? Legal and compliance told us we're allowed to charge this money under our contract with you. And if you look at the contract, we think we have a reasonable case, we can charge this money, but because there's a business disagreement, we're going to give you the money back, because we want to keep doing business with you. That's what people do when there's a business agreement. They don't lie.

And when they lie and call it a fat finger error, they don't hide the fact that they've also taken another $2 million in Europe that they're still not telling the client about. He chose to lie. And you know that he chose to lie, because then when he e-mailed Chris Carlin and said give the money back, his number two, his chief operating officer, he said to Carlin, we overcharged the client. That's Exhibit 162. You have it in evidence, you can take a look at it.

If legal authorized it, then they didn't overcharge anyone. They made a business decision to give the money back. If legal and compliance authorized it, why, on August 25th, when Marshall Bailey, the senior executive in Europe, who has now been told by Rick Boomgaardt what exactly went on here, when he e-mailed the defendant and said who in legal and compliance has authorized what you're doing, why

didn't the defendant give him a name of who in legal and compliance authorized it? Why did he say I'll give you a call, instead.

That's Exhibit 189.

If legal and compliance had authorized this, ladies and gentlemen, why, on that August 26th phone call, between the three co-conspirators, Rick Boomgaardt, Ed Pennings, and the defendant, Ross McLellan. Why didn't a single one of them mention that legal and compliance had authorized what they were doing. If they all thought it was okay, why are they so stressed out, why are they reviewing the contract as though for the first time on that phone call.

If Simone Paul had said in that April 2011 meeting, Ed, go ahead with what you're doing. We think it's great. We think it's a terrific new business model, why didn't anyone mention it on that phone call? Why didn't the defendant say, hey, wait a minute. I thought in April of 2011 you got clearance from John Norris and Simone Paul. We're okay here. Why, instead, were they lying to their compliance officer all week long.

Mr. Weinberg wants you to believe there wasn't a lie in that compliance letter that Ed Pennings drafted at the defendant's direction and repeatedly redrafted over and over again. You have the different versions of that letter in evidence. You can take a look at it. It says that these

commissions were applied in error. That is a flat-out lie. You heard him order the commissions.

It says that the million dollars was the full amount overcharged, after looking at all TRACE and nonTRACE eligible bonds. Those were lies. They were holding onto $2 million in Europe that they hadn't told Mark Hansen about. The defendant himself said on August 26th at the end of the week, after Rick Boomgaardt has reported to higher-ups what's going on here, that he has finally brought Hansen into the loop.

And you heard that phone call, where the defendant is relating his conversation with Hansen to Rick Boomgaardt. And you'll hear him say that Hansen asks, are you guys being straight with us? Because he knew he had been lied to and the defendant's response, sure, we've never hidden the fact that we purposely charged commissions here. But you know that's not true. He's been lying to Hansen about purposely charging commissions all week long.

Ladies and gentlemen, those calls on August 26th are devastating evidence of the defendant's guilt. Devastating evidence that he wasn't acting in good faith, devastating evidence that he never believed the contract allowed any of it, and certainly devastating evidence that he and nobody else had ever checked with legal and compliance, and he knew that.

A moment on those contracts that Mr. Weinberg was talking about. He points you to the Royal Mail contract and the communication with -- with -- between Ed Pennings and Ian McKnight. That e-mail, that missile in the night that you heard about. You saw Ian McKnight testify. He told you exactly why he sent the e-mail asking for the avoidance of doubt, not because he was confused. He knew exactly what State Street had promised. He just didn't want them to be able to wriggle out of it.

And you heard the defendant himself on that August 26th phone call say all he needed to do was look at the request for proposal, the RFP. Their response to Royal Mail. And he knew that they didn't have a leg to stand on. Because they hadn't just promised a flat fee. They'd been absolutely explicit, zero commissions. And then he had gone on and personally ordered those commissions. He knew that they had lied to Royal Mail, and it didn't depend on any secret communications between Ed Pennings and Ian McKnight.

But he wants you to focus on that contract with Royal Mail. The provision in the contract that, by the way, he, himself, said on that August 26th phone call, doesn't say you can, doesn't say you can't. Rick Boomgaardt says it absolutely says you can't. They're reading it as though for the first time on that phone call, trying to come up with a cover story. But that's not the only contract at issue here.

There's NTMA. NTMA, Mr. Weinberg himself says -- Mr. Pennings told Boomgaardt to check, make sure it doesn't say we can't charge a spread, because we're going to have to here. Well, of course, it doesn't say what you're not going to charge. It only says what you are going to charge. No contract says you cannot lie. No contract says you cannot steal. We all know that since grade school. We cannot do those things, that the law forbids those things.

And the contract he didn't mention to you was the Sainsbury's contract. Why didn't he mention that one to you, because that one explicitly does say you can't charge me anything without disclosing it in the periodic notice, and the periodic notice doesn't disclose commissions, it only discloses a flat fee. The contracts here, ladies and gentlemen, are not what they were relying on at the time, and the contracts don't allow them to do what they did. And legal and compliance never said that the contracts allow them to do what they did.

The contracts are something they came up with to point to after the fact as a cover story, and the cover story doesn't even work. Because the contracts don't allow them to do what they did. You heard it on the phone call, well, how do we justify the two basis points in Europe, versus the one basis point in the United States? And the defendant's response? I don't know. You got to come clean, you come

clean with everything. You come clean with everything.

Who talks about coming clean if they think that what they're doing is authorized under a contract? Who talks about coming clean if they think that legal and compliance has signed off? Coming clean is the language of liars and criminals. That's who comes clean. People who know what they've done is wrong.

Mr. Weinberg talks about the cooperating witnesses and he says you can't believe these cooperating witnesses. They have been corrupted for the benefits that they've received. Let's think about that for a minute. What benefits have these cooperating witnesses received?

The benefit of being permitted to plead guilty to a crime in the United States? The benefit of being allowed possibly to serve out whatever time they have to serve in prison, in a British jail, as opposed to an American jail? That's a tremendous benefit, ladies and gentlemen.

What Mr. Weinberg wants you to believe, as absurd as it sounds, is that these cooperating witness are lying about having committed a crime, that they were operating in good faith at the time, but they have bizarrely, instead, pled guilty to a crime that they didn't commit. That's what he is asking you to believe, that they have pled guilty to a crime that they didn't commit.

I submit to you, ladies and gentlemen, that is

flat-out absurd.

But at the end of the day, we didn't pick these cooperating witnesses. Ross McLellan picked these witnesses. They're his guys. He's the one who called Ed Pennings "Saint Eddy." He's the one who said you the F-ing man when Ed Pennings brought in that KIA deal with the promise of a zero commission, where they were going to make millions of dollars.

Back up the truck, Ed Pennings. That's the defendant's guy. He wants you to believe they flew here from England to plead guilty to a crime they didn't commit? Rick Boomgaardt flew here without knowing that he was the subject of any investigation, because he wanted to get the record straight, he wanted to right what he had done wrong, he wanted to finally get out ahead of things and tell the truth.

Ed Pennings, you have his plea agreement in evidence. I urge you to take a look at it. It is signed weeks before he ever met with a Government, weeks before he was offered a cooperation agreement. You have the cooperation agreement in evidence, you can compare the dates. He signed that plea agreement, committed to plead guilty to the crime that he knew he had committed, because he could no longer "defend the indefensible," in his words. And only much later on did he meet with the Government, tell the truth, and become a cooperating witness for the Government.

That's not somebody who became a cooperating witness because of some benefit that he exepcted to receive. That's somebody who owned up to what he had done and was willing to face the consequences.

But you also have what they said at the time. Listen to that conversation that you have in evidence between Ed Pennings and Rick Boomgaardt about what was going on at ConvergEx.

Mr. Weinberg just showed you a slide where there was two stops on two different commissions with ConvergEx, but only one stop with State Street. The stop that he left out is the stop where they promised a flat fee instead of commissions. So it's exactly the same as the ConvergEx lie. A commission and another commission that's hidden. And in State Street's case, a flat fee instead of a commission and another commission that's hidden.

They knew that what ConvergEx was doing was wrong. They were promising a low flat fee -- a low fee and then secretly taking commissions that they weren't entitled to. And they said it in February of 2010, when Rick Boomgaardt and Ed Pennings were on the phone together, they said what ConvergEx is doing, it's wrong. They're relying on some ambiguous language about affiliates in the contract, when they're telling the clients that they're the agent and they're going to pass on benefits in the market on to the

client. That is exactly what they went on to do in this case.

And what did the defendant call it? He called it client abuse. That's the name of the attachment, that spreadsheet that Ed Pennings was shopping around when he was disparaging ConvergEx to their competitors. They knew it at the time. They knew at the time that what they were doing was wrong and the defendant knew it, as well.

Finally, ladies and gentlemen, quickly on AXA. Mr. Weinberg wants you to believe that AXA wasn't a fraud, because there wasn't a contract. So the argument is, where there is a contract and it has affiliate language, we can take hidden spreads and not tell the client about them, tell them something else. Where there's an NTMA contract and it doesn't say anything one way or the other about affiliates, in that case, we take hidden spreads and tell the client something else, because it doesn't say we can't. In Sainsbury's, where there is language that says we can't, we can do it any way. There's no explanation for that one, but we'll just put that one to the side for a moment. And then in the case of AXA, because there is no contact, we can lie to them, tell them we're charging one thing and go ahead and charge them something else.

Whether there is a contract, whether there isn't a contract, it doesn't matter what the contract says, we,

ourselves, can decide what's the appropriate price, tell the client one thing, and then charge them whatever we want behind their backs. That's the argument the defendant wants you to believe is legitimate in his mind.

That AXA pre-trade, which the defendant was copied on, was sent on February 24. It promised the thin to win price of $590,000. And then he went on the phone with those traders a couple days later and told them to charge something altogether different. $1.3 million.

That letter, Exhibit 212, that e-mail exchange about what's fair and reasonable, that certification that they supposedly needed to provide the client, but there's no evidence that they ever did? Take a look at that e-mail chain, Exhibit 212, Mr. McLellan's response, which Mr. Weinberg didn't mention to you was, we'll decide what's fair and reasonable. It's a metaphor for the case, ladies and gentlemen. He'll decide what's fair and reasonable for these clients, clients don't get a say in it. Ross McLellan gets to decide and not tell anyone, except if he decides to tell them.

And that is the same week, ladies and gentlemen, that he's instructing the traders. He's instructing Joe Dionisio to charge a hidden spread of $0.15 a share or $0.16 a share on those ETFs for NTMA. That's the same week that he's talking with Ed Pennings about the hidden spreads

they're going to charge Royal Mail of 1.5 to 2 basis points. It's no accident that it's the same week, ladies and gentlemen, because it's the same scheme.

He's flying all over the world, to Australia, and California, and wherever else. He's got a thousand deals under his watch in any one year.

THE COURT: Mr. Frank.

MR. FRANK: I'm wrapping it up, Your Honor.

And yet he's the one who's personally adding pennies per share on KIA, who's directing the traders on Royal Mail and on AXA and NTMA. And all of these victims have flown here from England, from Ireland, from the Netherlands and from New York City to tell you that they were defrauded.

He must be the unluckiest man in the world, ladies and gentlemen. Unluckiest man in the world to be mixed up in these frauds in two different continents where he is the single common denominator. Not Ed Pennings, not Rick Boomgaardt. Ross McLellan.

He lied and he directed others to lie, because he knew what he was doing was wrong. And that's the test. That's the test. Not that he knew he was breaking a specific law, but that he knew what he was doing was wrong and that's why he lied.

And now, ladies and gentlemen, it is up to you, and

you alone, to hold him accountable. To say that lying to customers, to cheat them out of their money is wrong. It's a crime. It's fraud. Common sense tells you that lying to cheat somebody out of their money is fraud. Common sense tells you that this defendant is guilty beyond a reasonable doubt as charged.

Thank you for your attention.

THE COURT: Thank you, counsel.

Ladies and gentlemen, I remind you that the arguments of counsel can be helpful, but they are not evidence. So you're almost done. What we're going to do is take a 20-minute break now, then I'll give you my final instructions on the law. I promise you that I will be shorter than the combined lawyers.

And so 20-minute break, you'll come back in, I'll give you my instructions and then you'll return to the jury room and you'll be able to commence your deliberations at that point.

All rise for the jury.

(The jury exits the courtroom.)

THE COURT: All right. We'll stand in recess, I'm going to make that one change. I'll print out a fresh copy for all of you and then I'll return it. Thank you.

(Court in recess at 12:03 p.m.

and reconvened at 12:25 p.m.)

THE CLERK: All rise. The McLellan matter is back in session.

THE COURT: So I would have preferred to make 15 copies, but the printer is too slow. So they'll have one copy in the jury room.

You can go get the jury.

(Pause.)

(Jury entered the courtroom.)

JURY INSTRUCTIONS

THE COURT: Please be seated.

So, members of the jury, you've heard all the evidence in the case. It is now time for me to give you my final instructions on the law you must apply when considering the evidence in reaching your verdict. You will notice that I am going to be reading verbatim much of what I say to you now. I do this because this is no time for creativity or spontaneity on my part. This case, indeed every criminal case, is governed by very well-established legal principles. This is not my law that I give to you now. This is the law handed down to us by our supreme court, federal appellate courts, and the United States Congress, and it is very important that I give you the law fully and accurately. So please bear with me if I appear to be reading at times and not speaking to you in a conversational way.

My instructions will be in three parts. First,

general rules and legal principles that control your duties as jurors and your consideration of the evidence you have heard; second, specific definitions and legal principles related to the elements of the offenses charged in this case; and third, guidelines for how you are to conduct your deliberations and return a verdict. I will give you a copy of these instructions to take with you into the jury room when you deliberate, so you should listen carefully but need not take notes as I read them to you.

Duty of the Jury to Find Facts and Follow Law.

It is your duty to find the facts from all the evidence admitted in this case. You and you alone are the judges of the facts. My opinion about the evidence in this case, if I have one, is totally irrelevant. You should not interpret anything I have said or done during the trial as indicating what I think about a witness or a piece of evidence or what I believe the verdict should be. It is your job, not mine, to determine what the facts are in this case.

To those facts you must apply the law as I give it to you. The determination of the law is my duty as the judge. It is your duty to apply the law exactly as I give it to you, whether you agree with it or not. Just as no one may question the facts as you find them, you may not question the law as I give it to you. You must decide the case solely on the evidence before you and according to the law as I give it

to you. The oath you took at the beginning of the case was a promise to do just that.

In following my instructions, you must follow all of them and not single out some and ignore others. They are all equally important. You must not read into these instructions any suggestions by me as to what verdict you should return. That is a matter entirely for you to decide.

Presumption of Innocence and Proof Beyond a Reasonable Doubt.

Every person accused of a crime is presumed to be innocent unless and until his or her guilt is established beyond a reasonable doubt. That means that Mr. McLellan is innocent in the eyes of the law unless and until you, the jury, decide by unanimous vote that the government has proved his guilt beyond a reasonable doubt. This presumption is not a mere formality. It is a cardinal principle in our justice system and a matter of the most important substance.

The presumption of innocence means that the burden of proof is always on the government to prove that Mr. McLellan is guilty of each crime with which he is charged beyond a reasonable doubt. This is a heavy burden and one which never shifts to Mr. McLellan. It is always the government's burden to prove each of the elements of the crime charged beyond a reasonable doubt by the evidence and the reasonable inferences to be drawn from the evidence. The

law does not require Mr. McLellan to prove his innocence or to produce any evidence at all.

The presumption of innocence alone may be sufficient to raise a reasonable doubt and to require the acquittal of a defendant. Mr. McLellan has the benefit of that presumption and you are not to convict him of any crime charged unless you are persuaded of his guilt of that charge beyond a reasonable doubt.

The term "reasonable doubt" is often used but is not easily defined. Reasonable doubt exists when, after weighing and considering all of the evidence in the case, using your reason and common sense, you cannot say you have a firm and settled conviction that a charge is true.

A reasonable doubt may arise not only from the evidence produced, but also from a lack of evidence. Mr. McLellan has the right to rely upon the failure or inability of the government to establish beyond a reasonable doubt any essential element of any crime charged against him. It is not necessary for you to conclude that Mr. McLellan is factually innocent in order to return a "not guilty" verdict. Such a verdict means only that the prosecution has not met its burden of proving Mr. McLellan guilty beyond a reasonable doubt.

You may not convict Mr. McLellan based on speculation or conjecture. You may, however, draw reasonable

inferences from the evidence. I will explain more about what types of inferences you may and may not draw shortly. The government has not met its burden and you may not convict Mr. McLellan if you decide that it is equally likely that he is guilty or not guilty. It is not sufficient for the government to establish a probability, even if it is a strong one, that a fact charged is more likely to be true than not true. That is not enough to meet the burden of proof beyond a reasonable doubt. On the other hand, there are very few things in the world that we know with absolute certainty, and in criminal cases the law does not require the government to offer proof that overcomes every possible doubt. It requires that the evidence exclude any reasonable doubt concerning Mr. McLellan's guilt.

Whether the government has sustained its burden of proof does not depend on the number of witnesses it has called or on the number of exhibits it has offered, but, rather, on the nature and quality of the evidence presented.

Again, Mr. McLellan is presumed to be innocent and the government bears the burden of proving his guilt beyond a reasonable doubt. If, after fair and impartial consideration of all the evidence, you are satisfied beyond a reasonable doubt of Mr. McLellan's guilt of a crime charged, you should vote to convict him of that crime. On the other hand, if, after fair and impartial consideration of all the evidence,

you have a reasonable doubt as to Mr. McLellan's guilt of the crime charged, it is your duty to acquit him of that crime.

Defendant's Constitutional Right Not to Testify.

All criminal defendants, including Mr. McLellan, have a constitutional right not to testify. Like the presumption of innocence, this is a fundamental principle in our system of criminal justice. No inference of guilt or of anything else may be drawn from the fact that Mr. McLellan did not testify. For any of you to draw such an inference or even to discuss in your deliberations Mr. McLellan's decision not to testify would be wrong and would violate your oath as a juror.

What Is Evidence; Stipulations; Inferences.

The evidence in this case consists of sworn testimony of witnesses, both on direct and cross-examination, the exhibits that have been received into evidence, and the facts to which the lawyers have agreed or stipulated. You should consider all of the evidence no matter what form it takes and no matter what party introduced it.

A stipulation means simply that the government and Mr. McLellan accept the truth of a particular proposition or fact. Since there is no disagreement, there is no need for evidence apart from the stipulation. You must accept the stipulation as fact, but you may give it whatever weight you choose.

Although you may consider only the evidence presented in the case, you are not limited to the plain statements made by the witnesses or contained in the documents. In other words, you are not limited solely to what you see and hear as the witnesses testify. You also are permitted to draw any reasonable inferences you believe are justified in light of common sense and personal experience. An inference is a deduction or conclusion that may be drawn from the facts that have been established. Any inference that you draw must be reasonable and based on the facts as you find them. Inferences may not be based on speculation or conjecture.

Direct and Circumstantial Evidence.

There are two kinds of evidence, direct and circumstantial. Direct evidence is direct proof of a fact such as testimony of a witness that the witness saw or did something. Circumstantial evidence is indirect evidence, that is, proof of a fact or facts from which you could draw a reasonable inference that another fact exists, even though it has not been proven directly.

You all have experience in your everyday life drawing inferences based on circumstantial evidence. For instance, imagine it was sunny when you arrived here this morning but just now someone walked into the courtroom wearing a wet raincoat and carrying a dripping umbrella.

Without any words being spoken and without looking outside for yourself, you might draw the reasonable inference that it is now raining outside. In other words, the facts of the wet raincoat and the dripping umbrella would be circumstantial evidence that it is raining.

You are entitled to consider both direct and circumstantial evidence. Neither type of evidence is considered superior or inferior to the other. The law permits you to give equal weight to both. It is for you to decide how much weight to give to any piece of evidence.

What Is Not Evidence.

Certain things are not evidence. I listed them for you in my preliminary instructions at the start of the trial, and I'll remind you of them now.

One, arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they said in their opening statement, closing arguments, and at other times during the trial was intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of the facts controls.

Two, questions to the witnesses, whether by the lawyers or by me, are not evidence standing alone. Again, the lawyers are not witnesses and neither am I. The question and the witness' answer taken together are the evidence.

Three, objections by lawyers are not evidence. Lawyers have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the fact that an objection was made or by my ruling on it. If I sustained an objection, you must ignore the question or exhibit and should not speculate or guess what the answer might have been or what the exhibit might have contained.

Four, anything you may have seen or heard when court was not in session is not evidence. You are to decide the case solely on the evidence received at trial.

Five, notes, if you have kept them, are not evidence. They are a personal memory aid to be used to refresh your recollection of the evidence during the deliberations. Do not assume simply because something appears in someone's notes, even your own, that it is necessarily what happened or was said in court.

Six, the indictment is not evidence. I caution you, as I have before, that the fact that Mr. McLellan has had an indictment filed against him is not evidence of his guilt. The indictment is simply an accusation and the means by which the charge was brought before this court. It proves nothing.

Seventh, anything that I've excluded from evidence or ordered stricken and instructed you to disregard is not

evidence, and you must not consider it.

Limiting Instructions As to Particular Kinds of Evidence.

At times, a particular kind of evidence was received for a limited purpose only. You may use such evidence only for one specific purpose and not for any other purpose. I have told when you that occurred and instructed you on the purposes for which the item can and cannot be used. You must adhere to those instructions when you consider those items during your deliberations.

Improper Considerations.

You must decide this case solely upon the evidence. You must not be influenced by any personal likes, dislikes, prejudices, or sympathies you may have about Mr. McLellan or any of the witnesses or about the nature of the crimes with which Mr. McLellan is charged. You may not consider or be influenced by any possible punishment or other consequences that may be imposed on Mr. McLellan as a result of a conviction. The duty of imposing sentence rests exclusively with me. The question of possible punishment is of no concern to you and should not influence your deliberations in any way. As I have explained, your function is to weigh the evidence in the case and determine whether the government has proved Mr. McLellan's guilt beyond a reasonable doubt relying only upon the evidence and according to the law.

Credibility.

Most evidence received in this case was offered through witness testimony. As the jury, you are the sole judges of the credibility of the witnesses. You do not have to accept the testimony of any witness if you find the witness not credible. In deciding what the facts are, you must determine what testimony you believe and what testimony you do not believe. To do this, you must look at all the evidence, drawing upon your common sense and personal experience. You may choose to believe everything a witness said, only a part of it, or none of it.

In deciding whether to believe a witness' testimony, you may consider a number of factors such as: The witness' conduct and demeanor while testifying; the witness' apparent fairness or any bias he or she may have displayed; any interest you discern that the witness may have in the outcome of the case; any prejudice the witness may have shown; the witness' opportunity to see, hear, or know the things about which he or she testified; the reasonableness of the events that the witness related to you in light of the other evidence which you believe; the quality of the witness' memory; and any other facts or circumstances disclosed by the evidence that tend to corroborate or contradict the witness' version of events.

Prior Inconsistent Statements.

You have heard at various times that certain witnesses who testified in this trial made previous statements about the same subject matter as their trial testimony. You may consider those earlier statements to help you decide how much of the witness' testimony to believe. If you find that a witness' prior statement was not consistent with that witness' testimony at this trial, then you should decide whether that affects the believability of that person's testimony. Sometimes, of course, people make innocent mistakes. Not every contradiction or inconsistency is necessarily important. Again, you alone are the judges of the witnesses' credibility.

Some prior inconsistent statements may be used for purposes other than impeachment. If you find that a witness has made inconsistent statements under oath on an earlier occasion, such as in a prior court proceeding, you may consider that earlier statement for its truth or falsity, the same as any other testimony at this trial.

Cooperating Witness Testimony.

You have heard evidence that Edward Pennings and Richard Boomgaardt pleaded guilty to charges arising from the events that are the subject of this trial. You must not consider their guilty pleas as evidence of Mr. McLellan's guilt. The decisions by Mr. Pennings and Mr. Boomgaardt to plead guilty were personal decisions about each person's own

guilt. You should disregard their guilty pleas completely when considering Mr. McLellan's guilt or innocence. You may consider the guilty plea by Mr. Pennings or Mr. Boomgaardt only for the purposes of determining how much, if at all, to credit his testimony. You should give Mr. Pennings' or Mr. Boomgaardt's testimony the weight you believe it deserves, keeping in mind that it must be considered with particular caution and great care.

You also have heard evidence that Mr. Pennings and Mr. Boomgaardt testified and provided evidence under agreements with the government. You should bear in mind that a witness who has entered into such an agreement has an interest in this case different from any ordinary witness. A witness who admits to committing a crime and testifies against others pursuant to a plea agreement with the government almost always does so in the expectation of more lenient treatment as a reward for his cooperation. Although some people in this position are entirely truthful when testifying, you must consider the testimony of Mr. Pennings and Mr. Boomgaardt with particular care and caution. They may have had reason to make up stories or exaggerate what others did because they wanted to help themselves. You must determine whether the testimony of such witnesses has been affected by any interest in the outcome of this case, any prejudice for or against Mr. McLellan, or by any of the

benefits they have received or expect to receive from the government. If after scrutinizing their testimony you decide to accept it, you may give it whatever weight, if any, you find it deserves.

Expert Testimony.

You have heard testimony from two expert witnesses in this case, Marc Menchel and Michael Travaglini, about securities trading and the investment industry. A witness who has special knowledge, experience, or training on a particular topic may testify and state an opinion concerning such matters.

Just like any other evidence, you may accept or reject such testimony in whole or in part. In weighing any expert's testimony, you should consider the factors that generally bear upon the credibility of a witness as well as the expert's qualifications, such as his education, experience and training, the soundness of the reasons given for his opinion, and all other evidence in the case. You should not accept a witness' testimony merely because he is an expert, nor should you substitute it for your own reason, judgment, and common sense. Remember that you alone determine the facts in this case. You alone decide how much of a witness' testimony to believe and how much weight it should be given.

Law Enforcement Witnesses.

You have heard the testimony of government agents, including special agents for the Federal Bureau of Investigation. You must evaluate that testimony just like any other testimony or evidence in this case in deciding whether to accept it or reject it. The fact that a witness may be employed as a government agent does not mean that his testimony is deserving of more or less consideration or greater or less weight than that of any other witness. Again, it is for you to decide whether to accept the testimony of any witness and what weight, if any, to give that testimony.

Audio Recordings and Transcripts.

During the trial, you heard audio recordings of phone conversations featuring Mr. McLellan or certain witnesses. These recordings were admitted as exhibits and are part of the evidence in this case for you to consider. To assist you in listening to the recording, I allowed you to have transcripts to read along as the recordings were played. The transcripts were merely to help you understand what was said on the recordings. These transcripts will not be available to you as evidence during your deliberations. If you believe at any point that a transcript said something different from what you heard on the corresponding recording, remember that it's the recording that is the evidence, not the transcript. Any time there's a variation between a

recording and its transcript, you must be guided solely by what you heard on the recording and not what you saw on the transcript.

Statements by the Defendant.

You have heard evidence that Mr. McLellan made certain statements. For instance, in e-mail conversations and recorded phone calls and during an interview with in a special agent with the FBI. The government claims that in those statements, Mr. McLellan admitted certain facts. It is for you to decide: One, whether Mr. McLellan made the statements; and two, if so, how much weight to give those statements. In making those decisions, you should consider all the evidence about the statement, including the circumstances under which the statements may have been made, and any facts or circumstances tending to corroborate or contradict the version of events described in the statements.

Mr. McLellan is charged in an indictment that contains six separate counts that charge six different crimes. Each count will be set forth separately on the verdict form you'll be asked to return. You must consider each count separately and you must return a separate verdict as to each count. You may find Mr. McLellan guilty of every charge, you may find him not guilty of every charge, or you may find him guilty of some charges and not guilty of others. Your verdict as to each count must be unanimous and must be

determined solely on the evidence or lack of evidence presented against Mr. McLellan on that count.

Exhibits and Exhibit Numbers.

The exhibits that have been admitted into evidence for your consideration will be given to you when you retire for your deliberations. The numbers assigned to the exhibits are for convenience and to ensure an orderly procedure. You should draw no inference from the fact that a particular exhibit was assigned a particular number or that there may be gaps in the number sequence.

That concludes the first part of my instructions, ladies and gentlemen. Maybe before I turn to Part II, if you want to stand up and stretch for a moment, you might enjoy that. I certainly would like to do that.

So Part II of my instructions. I'm going to instruct you on the nature of the crimes charged in the indictment and the elements of each offense that the government must prove beyond a reasonable doubt.

Count One, Conspiracy.

Count One of the indictment accuses Mr. McLellan of conspiring with Edward Pennings, Richard Boomgaardt, and others to commit a federal crime. Specifically, Mr. McLellan is alleged to have conspired to commit the crimes of securities fraud and wire fraud by agreeing to engage in a scheme to defraud at least six of State Street's transition

management clients in Europe and the Middle East by applying hidden commissions to securities trades conducted on behalf of those clients in or about and between February 2010 and September 2011.

For you to find Mr. McLellan guilty of conspiracy, you must be convinced the government has proven each of the following three things beyond a reasonable doubt:

First, that an agreement to commit securities fraud and/or wire fraud existed between at least two people in or about and between February 2010 and September 2011; second, that Mr. McLellan willfully joined in that agreement; and Third, that one of the conspirators committed an overt act during the period of the conspiracy in an effort to further the purpose of the conspiracy.

You will note that the government charged Mr. McLellan with committing offenses "on/in or about" certain specific dates. It does not matter if the indictment charges that a specific act occurred in or around a certain date and the evidence indicates that, in fact, it was on another date. The law only requires a substantial similarity between the date alleged in the indictment and the date established by testimony or exhibits.

A conspiracy is an agreement, spoken or unspoken, express or tacit, among two or more conspirators to accomplish a criminal or unlawful purpose. The conspiracy

does not have to be a formal agreement or plan in which everyone involved sat down together and worked out all the details. But the government must prove beyond a reasonable doubt that those who are involved shared a general understanding about the crime, including the object of the conspiracy. Similar conduct among various people or the fact they may have associated with each other or discussed common names and interests does not necessarily establish of proof of the existence of a conspiracy but you may consider such factors.

The government does not have to prove that Mr. McLellan agreed to commit both securities fraud and wire fraud in order for to you find him guilty of the conspiracy charge. The government must, however, prove that Mr. McLellan agreed to commit at least one of these two crimes. You cannot find Mr. McLellan guilty of conspiracy unless you unanimously agree that the same federal crime was the object of the conspiracy. That is, to convict Mr. McLellan of conspiracy, you all must agree that Mr. McLellan is guilty of conspiracy to commit securities fraud and/or you all must agree that Mr. McLellan is guilty of conspiracy to commit wire fraud.

To act "willfully" means to act voluntarily and intelligently and with the specific intent that the underlying crime be committed; that is to say, with bad

purpose, either to disobey or disregard the law, and not to act by ignorance, accident or mistake. The government must prove two types of intent beyond a reasonable doubt before Mr. McLellan can be said to have willfully joined the conspiracy charged here: an intent to agree; and an intent, whether reasonable or not, that securities fraud and/or wire fraud be committed. Mere presence at the scene of the crime is not alone enough, but you may consider it among other factors. Intent may be inferred from the surrounding circumstances.

Proof that Mr. McLellan willfully joined in the agreement must be based upon evidence of his own words and/or actions. You need not find that Mr. McLellan agreed specifically to or knew about all of the details of the crime, that he knew every other co-conspirator, that he participated in each act of the agreement, or that he played a major role in it. However, the government must prove beyond a reasonable doubt that Mr. McLellan knew the essential features and general aims of the venture. Even if Mr. McLellan was not part of the agreement at the very start, he can be found guilty of conspiracy if the government proves that he willfully joined the agreement later. On the other hand, a person who has no knowledge of conspiracy but simply happens to act in way that furthers some object or purpose of the conspiracy does not thereby become a conspirator.

An overt act is any act knowingly committed by one or more of the conspirators in an effort to accomplish some purpose of the conspiracy. The overt act itself need not be illegal. Only one overt act has to be proven. The government is not required to prove that Mr. McLellan personally committed or knew about the overt act. It is sufficient if one co-conspirator comitted one overt act at some time during the period of the conspiracy.

The government does not have to prove that the conspiracy succeeded or was achieved. The crime of conspiracy is complete upon the agreement to commit the underlying crime and the commission of one overt act.

Question 1 of the verdict form -- and this is the verdict form that you will receive in the jury room, question 1 is here.

Question 1 of the verdict form asks you to decide whether the government has proved beyond a reasonable doubt that Mr. McLellan conspired to commit securities fraud and/or wire fraud by rendering a verdict of guilty or not guilty.

Counts Two and Three: Securities Fraud.

Count Two and Three charge Mr. McLellan with securities fraud. Congress has passed laws regulating the purchase and sale of securities in the United States. Section 78j subsection (b) of Title 15 of the United States Code states in part:

"It shall be unlawful for any person directly or indirectly, by the use of any means or instrumentality of interstate commerce or the mails, or any facility of any national securities exchange...

"To use or employ in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered... any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange Commission] may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Section 78ff subsection (a) of Title 15 provides in relevant part that no person may "willfully violat[e] any provision of this chapter... or any rule or regulation thereunder."

And Rule 10b-5, a regulation adopted by the Securities and Exchange Commission reads as follows:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of any mails or facility or national securities exchange,.

"(a) To employ any device, scheme, or artifice to defraud,

"(b) To make any untrue statement of a material

fact or to omit to state a material necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or,

"(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

Elements of Securities Fraud.

Count Two alleges that Mr. McLellan violated these laws by committing securities fraud in relation to fixed income and equity securities traded on behalf of NTMA as part of a transition managed by State Street in multiple tranches, in or about between February 2011 and May 2011.

For you to find Mr. McLellan guilty of securities fraud, you must be convinced the government has proven each of the following three things beyond a reasonable doubt:

First, that in connection with the purchase or sale of one or more of the securities traded on behalf of NTMA, Mr. McLellan did at least one of the following:

One, employed a device, scheme or artifice to defraud; two, made an untrue statement of material fact or omitted to state a material fact necessary to make statements not misleading in light of the circumstances; or three, engaged in any act, practice, or course of business that operated or would operate as a fraud or deceit upon NTMA;

Second, that Mr. McLellan acted willfully, knowingly, and with the intent to defraud; and,

Third, that Mr. McLellan used or caused to be used any means or instruments of interstate commerce, or of the mails, or of any national securities exchange in furtherance of the fraudulent conduct.

Requirements of a Fraudulent Act.

With respect to the first element, it's not necessary for the government to establish all three types of unlawful conduct. You may find this element satisfied if you determine that the government has proven any one fraudulent act, but you must be unanimous as to which type of conduct, if any, has or have been proven beyond a reasonable doubt. That is, to convict Mr. McLellan, you must all agree that the same type of conduct described above has been proven.

Neither success of the scheme nor profit or benefit from the scheme are elements of the crime charged.

In connection with the Purchase Or Sale of a Security.

The first element of this offense requires the government to prove beyond a reasonable doubt that the alleged conduct was in connection with the purchase or sale of a security. This requirement is satisfied if you find that Mr. McLellan's alleged conduct in some way touched upon or coincided with a securities transaction; that is, that the

alleged fraud or deceit had some relationship to these individual sales or purchases.

Device, Scheme, or Artifice to Defraud.

One type of unlawful conduct that the government may prove beyond a reasonable doubt is the existence of a device, scheme, or artifice to defraud. A device, scheme, or artifice to defraud means the forming of some invention, contrivance, plan, or design to trick or to deceive in order to obtain money or something of value. A "device" is an invention, a contrivance, or the result of some plan or design. A "scheme" is a design or a plan formed to accomplish some purpose. An "artifice" is an ingenious contrivance or plan of some kind.

Material Representation.

A second type of unlawful conduct the government may prove is the making of an untrue statement of a material fact or the deliberate omission to state a material fact necessary to make statements not misleading in light of the circumstances. A statement, claim, or document is fraudulent, one, if it was false when it was made, or if it was made with reckless indifference as to its truth or falsity; and two, if it was made or caused to be made with an intent to deceive. A deceitful statement of half-truths or the concealment of material facts may also constitute fraud under the statute if such half-truth or concealment was

intended to be misleading. However, there is no general legal duty to disclose fixed income commissions, spreads or markups or markdowns. You may not convict Mr. McLellan solely based on the taking of undisclosed revenues.

In deciding whether Mr. McLellan has made any untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements made not misleading, you may consider both, one, statements or omissions that Mr. McLellan personally made; and two, statements or omissions that Mr. McLellan caused to be made.

If you find that the government has established beyond a reasonable doubt that a statement was false or a fact fraudulently omitted, you must next determine whether the fact misstated or omitted was material under the circumstances. A fact is "material" if there is a substantial likelihood that a reasonable investor would consider the fact important when making an investment decision. In other words, a statement contains a material fact if there is a substantial likelihood that a reasonable investor engaging a transition manager would view the statement as significantly altering the total mix of information available. In determining whether a fact is material, you may consider all of the circumstances surrounding the making of the statement. You may consider the testimony of a victim as evidence in determining what

would be material to a hypothetical reasonable investor under the circumstances.

Fraud or Deceit.

A third type of fraudulent conduct the government may prove is an act, practice, or course of business that operated as a fraud or deceit upon NTMA.

Intent.

The second element of the crime of securities fraud the government must prove beyond a reasonable doubt is that Mr. McLellan participated in the scheme to defraud knowingly, willfully, and with intent to defraud.

An act is done "knowingly" if it is done purposefully and deliberately and not because of a mistake, accident, mere negligence, or some other innocent reason.

"Willfully" here means to act with the intent to do something that the law forbids, that is to say, with a bad purpose either to disobey or to disregard the law. The government need not prove that Mr. McLellan knew that he was breaking any particular law or rule. The government must prove, however, that he was aware of the general wrongfulness of his acts and that his acts were not due to negligence, inadvertence, or mistake.

A person acts with "intent to defraud" if he acts knowingly and with a specific intent to deceive. In other words, to act with intent to defraud means to know of the

fraudulent nature of the scheme and to act with the intent that the scheme succeed, ordinarily, but not necessarily, for the purpose of causing some loss to another or to bring some gain to oneself.

The question of whether Mr. McLellan acted knowingly, willfully, and with intent to defraud is a question of fact for you to determine, just as you determine any other fact at issue. This question involves Mr. McLellan's state of mind and the purpose for which he acted at the time the acts in question occurred. Direct proof of knowledge and fraudulent intent is almost never available. It would be a rare case where it could be shown that a person wrote or stated that as of a given time in the past he committed an act with fraudulent intent. Such direct proof is not required.

Knowledge and intent, though subjective, may be proven by circumstantial evidence based upon a person's outward manifestations, his words, his conduct, his acts, and all the surrounding circumstances disclosed by the evidence and the rational or logical inferences that may be drawn therefrom. Circumstantial evidence, if believed, is of no less value than direct evidence. Regardless of whether evidence is circumstantial or direct, the government must prove the essential elements of the crime charged beyond a reasonable doubt.

As I have mentioned, success is not an element of the crime charged. However, if you find that Mr. McLellan did profit from the alleged scheme, you may consider that in considering Mr. McLellan's state of mind.

Good Faith.

Because an essential element of securities fraud is intent to defraud, if you find that Mr. McLellan acted in good faith or held an honest belief that his actions were proper and not in furtherance of any unlawful activity, you cannot convict him of that crime. However misleading or deceptive conduct may have been, Mr. McLellan did not violate the law if he acted in good faith. False statements or misrepresentations are not fraudulent unless made with fraudulent intent. Mr. McLellan has no burden to establish a defense of good faith. The burden is always on the government to prove criminal intent and consequent lack of good faith beyond a reasonable doubt.

Use of Any Instrumentalities of Interstate Commerce or Any National Securities Exchange.

The third and final element the government must prove beyond a reasonable doubt with respect to Counts Two and Three is that Mr. McLellan knowingly used or caused to be used either, (a), any instrumentalities of interstate commerce; or, (b), a facility of a securities exchange in the United States, in either case, in furtherance of the scheme

to defraud.

The term "instruments of interstate commerce" include any number of means of conducting commerce or communication among one or more than one state, such as interstate telephone calls and e-mails. Instrumentalities of interstate commerce include the use purely within one state of a telephone call, e-mail, or any other instrument used to conduct interstate communications.

The government need not prove that Mr. McLellan was directly or personally involved in using an instrumentality of interstate commerce or a facility of a securities exchange in the United States. It's enough if you find that Mr. McLellan, by his actions, directly or indirectly initiated steps, or induced others to initiate steps, that resulted in a causal chain of events resulting in the use of an instrumentality of interstate commerce.

With regard to using instrumentalities of interstate commerce like telephones or e-mail, it is not necessary that whatever was communicated was fraudulent or otherwise criminal or objectionable. The matter communicated may be entirely innocent so long as it is in furtherance of the scheme to defraud. The use of any instrumentality of interstate commerce also need not be central to the execution of the scheme. All that is required is that use of any instrumentality of interstate commerce bears some relation to

the object of the scheme or fraudulent conduct.

Some of the transactions that you heard about involve trades of securities in the over-the-counter markets rather than on a securities exchange. For these types of securities to be the subject of securities fraud, the government must prove that the purchase or sale of such securities occurred in the United States. A purchase or sale of securities occurs in the United States if, one, the seller incurs irrevocable liability to deliver a security within the United States, or the buyer incurs irrevocable liability to pay for a security within the United States; or, two, if title to the security passes within the United States. Securities transactions conducted by a U.S.-based agent on behalf of a foreign buyer or seller can still occur in the United States even if title originates from abroad or is ultimately transferred abroad at the end of a transaction.

Accordingly, you cannot convict Mr. McLellan on Count Two unless you find the government has established all three elements of securities fraud that I've just described. Question 2 of the verdict form asks you to decide whether the government has proved beyond a reasonable doubt that Mr. McLellan committed securities fraud with respect to the NTMA transition by rendering a verdict of guilty or not guilty.

Count Three of the indictment alleges that

Mr. McLellan committed securities fraud in relation to the fixed-income securities traded on behalf of Royal Mail as part of a transition managed by State Street in or about March of 2011. You should apply the explanation of the elements of securities fraud that I previously gave you with respect to Count Two. Question 3 of the verdict form, here, asks you to decide whether the government proved beyond a reasonable doubt that Mr. McLellan committed securities fraud with respect to the Royal Mail transition by rendering a verdict of guilty or not guilty.

Counts Four and Five: Wire Fraud.

Mr. McLellan is charged in Count Four and Count Five with wire fraud. Chapter 1343 of Title 18 of the United States Code prohibits "having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice."

Count Four charges Mr. McLellan with wire fraud relating to an April 5, 2011 e-mail from Edward Pennings to Mr. McLellan allegedly noting plans to, quote, increase the spreads, quote, on trades conducted for NTMA.

For you to find Mr. McLellan guilty of wire fraud, you must be satisfied the government has proven each of the following things beyond a reasonable doubt:

First, that there was a scheme to defraud or obtain money or property by means of false or fraudulent pretenses; second, that the scheme to defraud involved a misrepresentation or concealment of a material fact, or the scheme to obtain money by means of false or fraudulent pretenses involved a false statement, half-truth, or knowing concealment concerning a material fact or matter; third, that Mr. McLellan knowingly and willfully participated in this scheme with the intent to defraud; and fourth, that the purpose of executing the scheme or in furtherance of the scheme, Mr. McLellan caused an interstate or foreign wire communication to be used, or it was reasonably foreseeable that for the purpose of executing the scheme or in furtherance of the scheme, an interstate wire communication would be used, on or about April 5, 2011 in the form of the alleged e-mail from Mr. Pennings.

I will now explain these elements of wire fraud for you in greater detail. Please note the definitions of certain terms you have already heard with respect to securities fraud in Counts Two and Three may differ in meaning with respect to wire fraud.

A "scheme" includes any plan, pattern, or course of

action. It's not necessary the government prove all of the details alleged in the indictment concerning the precise nature and purpose of the scheme or that the alleged scheme actually succeeded in defrauding anyone. But the government must prove beyond a reasonable doubt that the scheme was substantially as charged in the indictment.

The term "defraud" means to deceive another in order to obtain money or property. Misrepresentations amounting only to deceit are insufficient to maintain a wire fraud charge. A scheme to defraud ordinarily is accompanied by a desire or purpose to bring about some gain or benefit to oneself or some other person or entity or by desire or purpose to cause some loss to some purpose or entity.

A scheme to defraud may be carried out by making false or fraudulent statements and representations. You should analyze whether a statement or misrepresentation is false or fraudulent according to the instructions that I gave you with respect to Counts Two and Three for securities fraud.

The term "false and fraudulent pretenses" means any false statements or assertions that were either known to be untrue when made or made with reckless indifference to the truth or intent to defraud. The term includes actual, direct false statements as well as half-truths and the knowing concealment of facts.

A fact is "material" if it has a natural tendency to influence or be capable of influencing the decision of the person to whom it was addressed under the circumstances. In this case, you should consider whether the fact would have a natural tendency to influence or be capable of influencing the decision of a reasonable investor engaging a transition manager.

For purposes of wire fraud, a person acts "knowingly" if he is conscious and aware of his actions, realizes what he is doing or what is happening around him, and does not act because of ignorance, mistake, or accident.

For the purposes of wire fraud, an act is "willful" if it is done voluntarily and intentionally and with the specific intent to do something the law forbids or with the specific intent to fail to do something the law requires to be done, that is to say, with bad purpose either to disobey or disregard the law.

To act "with intent to defraud" means to act willfully and with a specific intent to deceive or cheat for the purpose of either causing some financial loss to another or to bring about some financial gain to oneself. Thus, if Mr. McLellan acted in good faith, he cannot be guilty of wire fraud. Misunderstanding legal requirements or simply being wrong do not preclude a finding that one's actions were undertaken in good faith. Mr. McLellan has no burden to

establish he acted in good faith. Rather, the burden is always on the government to prove fraudulent intent and lack of good faith as well as all the other elements of the crime beyond a reasonable doubt.

Again, intent or knowledge may not ordinarily be proven directly because there is no way of directly scrutinizing the workings of a human mind. In determining what Mr. McLellan knew or intended at any particular time, you may consider any statements made or acts done or omitted by Mr. McLellan and all other facts and circumstances received in evidence that may aid in your determination of Mr. McLellan's knowledge or intent.

Wire communications in interstate or foreign commerce include a telephone communication or e-mail from one state to another or between the United States and another country. The wire communication does not itself have to be essential to the scheme, but it must have been made for the purpose of carrying out the scheme. There is no requirement that Mr. McLellan himself was responsible for the wire communication, that the wire communication itself was fraudulent, or that the use of wire communication facilities in interstate commerce was intended as the specific or exclusive means of accomplishing the alleged fraud. But the government must prove beyond a reasonable doubt that Mr. McLellan knew or could reasonably have foreseen the use

of a wire communication would follow in the course of the scheme. To "cause" an interstate wire communication to be made is to do an act with knowledge that an interstate wire communication will follow in the ordinary course of business or where such communication can reasonably be foreseen. Here the government alleges an April 5, 2011 e-mail as the wire communication.

Question 4 of the verdict form here asks you to decide whether the government proved beyond a reasonable doubt that Mr. McLellan committed wire fraud with respect to NTMA, the April 5, 2011 e-mail, by rendering a verdict of guilty or not guilty.

Count Five charges Mr. McLellan with wire fraud relating to a June 22, 2011 e-mail from Mr. McLellan to Edward Pennings allegedly directing Pennings to inform Royal Mail that "inadvertent commissions" had been applied to trades in the United States. You should apply the explanation of the elements of wire fraud I previously gave you with respect to Count Four. You can see we're almost done. Question 5 of the verdict form asks you to decide whether the government proved beyond a reasonable doubt that Mr. McLellan committed wire fraud with respect to Royal Mail, June 22, 2011 e-mail, by rendering a verdict of guilty or not guilty.

Count Six: Wire Fraud Affecting a Financial

Institution.

Count Six charges Mr. McLellan with wire fraud affecting a financial institution. Section 1343 of Title 18 of the United States Code prohibits wire fraud which, quote, affects a financial institution, quote.

Specifically, Mr. McLellan is alleged to have committed wire fraud affecting both State Street Corporation and AXA Equitable Life Insurance Company in connection with an alleged e-mail sent from Boston, Massachusetts to New York, New York, attaching a proposal to AXA to manage a fixed-income transition for a fee of approximately $592,000, on or about February 24, 2011.

For you to find Mr. McLellan guilty of wire fraud affecting a financial institution, you must be satisfied the government has proven each of the following things beyond a reasonable doubt:

First, that there was a scheme to defraud or to obtain money or property by means of false pretenses; second, that the scheme to defraud involved the misrepresentation or concealment of a material fact, or the scheme to obtain money by means of false or fraudulent pretenses involved a false statement, half-truth, or knowing concealment concerning a material fact or matter; third, that Mr. McLellan knowingly and willfully participated in this scheme with intent to defraud; and fourth, that for the purpose of executing the

scheme or in furtherance of the scheme, Mr. McLellan caused an interstate or foreign wire communication to be used, or it was reasonably foreseeable that for the purpose of executing the scheme or in furtherance of the scheme, an interstate wire communication would be used, on or about the dates alleged. Here, the alleged wire communication is the February 24, 2011 e-mail to AXA.

I've already explained to you the first four elements of this count with respect to Counts Four and Five. In order to convict Mr. McLellan, you must find the government has proven each of these four elements beyond a reasonable doubt.

A fifth element of Count Six requires the government to prove beyond a reasonable doubt that the wire fraud scheme charged in this count affected a financial institution. The parties agree that the government has met its burden of proof that the conduct charged, quote, affected a financial institution, quote. You are instructed to find this element satisfied.

Question 6, the last question on the verdict form, asks you to decide whether the government proved beyond a reasonable doubt that Mr. McLellan committed wire fraud with respect to AXA, February 24, 2011 e-mail, affecting a financial institution by rendering a verdict of guilty or not guilty.

I've just explained to you what the government must prove to establish that Mr. McLellan personally committed or participated in Counts Two through Six. There is a second way the government can prove Mr. McLellan guilty of these counts.

The second way is for the government to prove beyond a reasonable doubt that Mr. McLellan aided and abetted the commission of the offense.

To "aid and abet" means intentionally to help someone else commit the charged crime. To establish aiding and abetting, the government must prove beyond a reasonable doubt:

First, that someone else committed the charged securities fraud or wire fraud; and second, that Mr. McLellan conscientiously shared the other person's knowledge of the securities fraud or wire fraud, intended to help the other person commit the securities fraud or wire fraud, and took part in the criminal endeavor seeking to make it succeed by taking an affirmative act.

To be found guilty as an aider and abettor, Mr. McLellan need not have committed the securities fraud or wire fraud, been present when it was performed, or been aware of the details of its execution. But a general suspicion that an unlawful act may occur or that something criminal is happening is not enough. Mere presence at the scene of the

securities fraud or wire fraud, even with knowledge that securities fraud or wire fraud is being committed, also is not sufficient to establish aiding and abetting. But you may consider these among other factors.

I've come now to the last part of my instructions, which are much briefer -- the rules for your deliberations.

When you retire to the jury room, you will discuss the case with your fellow jurors to reach agreement, if you can do so. The first thing you must do is select a foreperson. This will be the first decision you make together as a jury. The foreperson will have the same voice and the same vote as the other deliberating jurors. The foreperson will act as the moderator of the discussion and will serve as the jury's spokesperson. The foreperson's most important obligation is to ensure that any juror who wishes to be heard on any material issue has a full and fair opportunity to be heard by his or her fellow jurors. Your foreperson will preside over your deliberations and will speak for you here in court. Your foreperson's vote or opinion as to what the verdict should be is not entitled to any greater weight than that of any other member of the jury.

Your verdict must be unanimous. All of you must agree on the verdict.

Reaching agreement.

Each of you must decide the case for yourself, but

you should do so only after considering all of the evidence, discussing it fully with your fellow jurors, and listening to the views of the other jurors. Do not be afraid to change your opinion if you think you are wrong, but do not come to a decision simply because other jurors think it is right.

It is important you reach a verdict if you can do so conscientiously. There is no reason for you to think that another jury would be better qualified than you to decide the case. If it looks at some point as if you may have difficulty in reaching a unanimous verdict, and if a greater number of you are agreed on a verdict, the jurors in both the majority and the minority should reexamine their positions to see whether they have given careful consideration and sufficient weight to the evidence that has favorably impressed the jurors who disagree with them. You should not hesitate to reconsider your views from time to time and to change them if you are persuaded that doing so is appropriate.

It is important that you attempt to return a verdict but only if each of you can do so after having made your own conscientious determination. Do not surrender an honest conviction as to the weight and effect of the evidence simply to reach a verdict.

Communication with the Court.

If it becomes necessary during your deliberations

to communicate with me, you may send a note through the jury officer outside your door. The note must be signed by your foreperson or by one or more members of the jury. None of you should ever attempt to communicate with me on anything concerning the case except by a signed writing. I will communicate with any member of the jury on matters concerning the case only in writing or orally here in open court. If you send out a question, I will consult with the parties before answering it, and I will do so as promptly as possible. You may continue with your deliberations while waiting for the answer to any question.

Remember that you are not to tell anyone, including me, how the jury stands numerically or otherwise until after you have reached a unanimous verdict or have been discharged.

Verdict form.

After you have reached a unanimous verdict, your foreperson will fill in the verdict form that has been given to you, sign it and date it, and advise the jury officer outside your door that you are ready to return to the courtroom.

After you return to the courtroom, your foreperson will deliver the completed verdict form as directed in open court.

Final points.

Members of the jury, it's now time for the case to

be submitted to you. The exhibits that were admitted into evidence will be sent back with you to consider in your deliberations. You will also take your written copy of this charge. I want to caution you, however, not to dwell on any one particular portion of it, if you decide it review it at all, because you must consider these instructions as a whole. Each of you are equally entitled to read and consider the written charge as you see fit.

When you have commenced your deliberations, all of you must be together at all times when you are deliberating. Whenever you need a recess for any purpose, your foreperson may declare one. Do not discuss the case during the recess in your deliberations. All discussion of the case should occur only when you are all together and your foreperson has indicated that deliberations may proceed. This ensures that everyone on the jury has an equal opportunity to participate and to hear all of what other members of the jury have to say.

I thank you for your attention.

And now before we conclude, I just need to talk to the lawyers for a moment.

(Discussion at the sidebar.)

MR. WEINBERG: I have a series of objections that were largely made at the instruction conference, so I have no objection if your Honor wants to excuse the jury and let me

list them for you.

THE COURT: That's fine with me. It's quicker. Is that all right with you?

MR. FRANK: Yes, your Honor.

THE COURT: Do you have anything you want me to address?

MR. FRANK: No.

THE COURT: I'm going to explain to them about the three alternates now, and then I'm going to have them go back and get their stuff and then come back into the courtroom.

(End of discussion at sidebar.)

THE COURT: So, ladies and gentlemen, you're about to return to the jury room. I now actually have my most difficult task, which is to explain to you that three of your number are alternates. Juries in the United States are juries of 12. There are 15 of you. Let me explain why we have more than 12, because I think it happened at the beginning of this case, one person who was one of the 16 had to be excused. And sometimes, especially in the course of a trial that lasts a couple of weeks, as this one, somebody gets sick, something happens, an emergency, for whatever reason somebody needs to be excused from the jury. So that's why we have alternates. But only 12 deliberate. So all 15 of you can go to the jury room. Three of you -- I won't refer to you by name. On the front row, sir, you in the last

seat there, and in the back row, the two of you in the last two seats to my -- the far end closest to the gallery, the three of you are the alternates. So you can return to the jury room to say your goodbyes and to get your whatever items you had there, and then I'd ask you to return to the courtroom because I have one or two instructions for you before you go on your way.

For the remainder of you, you are the jury who will in a moment will all rise, we'll send you back to the jury room. You need to wait a moment or two to commence your deliberations because it will take us just five minutes or so just to assemble the exhibits, send them in, and turn on the TV system so you'll have everything on there.

All right?

All rise for the jury.

(Jury left the courtroom.)

THE COURT: You can be seated. Maybe before you put those matters on the record, Mr. Weinberg, you and Mr. Frank can assemble the exhibits, to the extent they're not already done, maybe we can put that on the record.

Is everything right there?

MR. FRANK: I think that's done, your Honor.

THE COURT: So I guess it's ready to go.

MR. WEINBERG: I would respectfully object to exhibits that define the party proposing them, this is

Department of Justice emblem and sign, I think that can come out.

MR. JOHNSTON: We can remove them.

THE COURT: Fine.

(Discussion off the record.)

THE COURT: So you're both content that the notebooks on top of the desk in front of Ms. Simeone can go to the jury with the instructions that I read and the verdict form?

MR. WEINBERG: Yes, your Honor.

THE COURT: All right. Same, Mr. Frank?

MR. FRANK: Yes, your Honor.

THE COURT: And Ms. Simeone can turn on the JERS system, and you're both agreeable to the list that's the index for the JERS system, you've all seen and reviewed that?

MR. WEINBERG: Yes, your Honor.

MR. FRANK: Yes, your Honor.

THE COURT: All right, fine.

I'm having -- since lunch is there, it doesn't seem fair to send the alternates home without lunch, I have a conference room behind the courtroom that's separate that has no papers relating to any case in there, the alternates are going to take their lunch, put their lunch in there, then come out here. I'll give them instructions, then I'll have Ms. Simeone take them up there, they can eat their lunch if

they wish, and then they'll go on their way.

Let's just wait for them to come back in.

If you want to put on the record what you want to put on the record now, you can, Mr. Weinberg.

MR. WEINBERG: Thank you, your Honor.

Number one is we object to the Court's not giving supplemental request and document 451 and request 1, and supplemental request 437 which seek that the statements that are being alleged to be the fraud have to be an affirmative misrepresentation, an affirmative lie.

Two, we object to the absence of an adverse inference instruction.

Three, we object to the absence of request number 22 and the original request --

(Alternate jurors entered the courtroom.)

THE COURT: Hi, you can have a seat right there for a minute, in the first three seats are fine. Please be seated.

Okay. So, first, just matters of convenience, I think you arranged, Ms. Simeone, they can --

THE CLERK: They didn't want to get any lunches.

THE COURT: You're all set. If you wanted to take lunch, that's fine.

So I want to -- two things. First of all, I thank you very much for your service because we really do need

alternates. It is one of the worst parts of my job is to discharge you. You sat through the whole proceedings and then we send you home to not participate in what the whole proceeding has aimed at. And I would say this. You're actually not done with your service as jurors. I'm not actually discharging you right now from your jury service. And the reason is this: It's possible still, as happens sometimes, that something happens to a juror and then we would need one of you. So the instructions that I've given you each day, don't discuss the case among yourselves, don't discuss it with anyone else, don't do any independent research, continue to apply to you. Because it's possible that -- you remain when you walk out of the courtroom alternates, and it's possible that we would need your service. If we do, you will hear from us. We'll call you and ask you to come in, and then I would explain to you whatever you need to know to join the deliberations.

Alternatively, if we don't need your service, when I know we don't need your service, you will hear from us and we will tell you at that point that you are discharged from your jury service.

I really do thank you very much for your service on the jury. It is really important that citizens like yourself are willing to serve, and it is really important that citizens be willing to serve not only as jurors but also as

alternates. Because as occurs in the regular course of life, things happen, people can't always continue in their jury service, so your presence has helped ensure that we could reach the end, if we need your service, that we will be able to reach the end. So I thank you very much to have your service and you're not discharged, but you're free to go on your way, and we will let you know when you are discharged.

Ms. Simeone will take you out and can show you how to get to the elevator.

All right. So all rise for the alternates.

(Alternate jurors left the courtroom.)

THE COURT: You can be seated.

Mr. Weinberg, you can go ahead and continue.

MR. WEINBERG: Thank you, your Honor.

So we object to the absence of instruction request 22, which we call the Grunewald instruction.

For the not giving request 2, which is that the jury cannot convict based on an omission.

The denial of request 3 and 5, an objection to the Court's instruction on the connection element of securities fraud.

We object on page 27 to the language that coincided or touched is sufficient.

On page 28, that the alleged false statement relate to an investment decision as being too broad.

We object to the denial of instruction request 4 and 6 which deal with materiality and again tie it to the buying and selling of security, and our definition of a reasonable investor.

We object to the denial of instruction 6 and 13 where we ask for a definition of sophisticated investor.

We object on page 29 of the instructions to the willfulness definition which instead of tying it to unlawful acts ties it to acting -- knowingly acting wrongly.

We object to request -- the denial of request 10 which fully sets out what we consider to be the extraterritoriality law regarding securities fraud counts and believe that the Court's instruction did not provide the jury with the guidance that's required by Morrison and other cases on securities fraud, and the domestic element requirement.

We object to the denial of request 18 in the failure to instruct on extraterritoriality regarding wire fraud.

We object to instructions on pages 26 to 30 regarding securities fraud and on page 33 regarding wire fraud in that the Court provided the jury with a number of different options, including reckless indifference, half-truth, concealment of facts, omitted statements that were needed to make other statements not misleading, and omissions themselves believing that they're inconsistent with

the government's theory of prosecution and estoppel basis given that the government has stated that this is an affirmative misrepresentation case.

We object to the Court's instruction on page 28 regarding consideration of victim testimony.

We object to the denial of supplemental request 8 which is the contracts replaced prior representations.

Object on page 22 to the Court's on or about instruction which in terms of Counts Four to Six has the capacity to invite conviction on the basis of conduct other than the specific wires alleged.

And finally, on page 34, we object to the Court's not instructing the sharp dealing and reliance on contract can be considered as evidence of good faith. Those matters that we have requested at Docket 437, instruction 4 and request 12 in our overall request for instructions.

Thank you very much, your Honor.

THE COURT: You're welcome.

Anything you want to add, Mr. Frank?

MR. FRANK: No, your Honor.

THE COURT: All right. So the jury has the exhibits, Ms. Simeone will be back, and she'll release the JERS system to them.

You can release the JERS.

THE CLERK: They're watching the tutorial on how to

use it.

THE COURT: Perfect.

If we don't hear from the jury before, then at -- why don't you come back at five of five. At 5:00, I'll send them home unless they then tell me they want to stay.

Ms. Simeone will know where to get you, Mr. Frank, Mr. Johnson.

Are you going to stay in the building, Mr. Weinberg?

MR. WEINBERG: We're going to go out for a while, but we'll all be within ten minutes of the building.

THE COURT: Fine. Put down your cell phones.

Ms. Simeone knows how to reach you in the office, Mr. Frank. Give Ms. Simeone your cell phones, too.

I will say that's the fastest preparation of exhibits to send back to the jury in any case over which I've presided, so very impressive that you had it all done.

(Discussion off the record.)

THE COURT: The JERS has been released.

Anything else before we adjourn? Okay.

MR. WEINBERG: Thank you, your Honor.

THE COURT: Thank you. We're adjourned.

(Court in recess at 1:46 p.m.
and reconvened at 4:23 p.m.)

(The jury enters the courtroom.)

THE COURT: So I understand, ladies and gentlemen, you want to go home for the day, which is fine. As I told you, you're in charge of your schedule.

So don't discuss the case when you're outside the jury room. So don't discuss the case among yourselves anymore, don't discuss the case with anyone else. Don't do any independent research.

I'll see you tomorrow morning. I'll bring you in at 9:00, just to confirm that you complied with those instructions and send you on your way, and you'll resume your deliberations.

THE JUROR: We discussed, potentially, coming in a little early for us.

THE COURT: Yes. You tell me that time, and I'll bring you in here then. You're in charge.

THE JUROR: We thought about 8:30.

THE COURT: You want me to meet you at 8:30? I'll bring you in at 8:30. Or when you're all here --

THE JUROR: We'll still do 9:00. I don't know if everyone will be here by 8:30.

THE COURT: Fine. So I'll bring you in the courtroom at 9:00. I have no objection to you commencing deliberations before you come out into the courtroom, provided no deliberations until all of you are there. And I will bring you out at 9:00 to confirm that everybody followed

my instructions.

Is that all right?

MR. WEINBERG: Of course, Your Honor.

MR. FRANK: No objection, Your Honor.

THE COURT: Okay. Fine. Good.

Then, have a nice evening, all rise for the jury.

(The jury exits the courtroom.)

THE COURT: Well, they're hard working, they want to come in early.

MR. WEINBERG: That's a first, right?

THE COURT: So 9 o'clock, I'll bring them in just to confirm that, and send them on their way. I'll see you then.

MR. FRANK: So we should be here at 9 o'clock?

THE COURT: I think so. I think I'd rather not be in the courtroom with the jury, without all of you.

MR. WEINBERG: We'll be here?

THE COURT: Okay. Thank you.

(Court in recess at 4:25 p.m.)

CERTIFICATE OF OFFICIAL REPORTER

We, Rachel M. Lopez and Debra M. Joyce, Certified Realtime Reporters, in and for the United States District Court for the District of Massachusetts, do hereby certify that pursuant to Section 753, Title 28, United States Code, the foregoing pages are a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 25th day of June, 2018.

/s/ RACHEL M. LOPEZ

/s/ DEBRA M. JOYCE

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Rachel M. Lopez, CRR
Debra M. Joyce, RMR, CRR
Official Court Reporter